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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

JOHN CUNEO, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. May the National Labor Relations Board declare that a strike, found by it to have been economic in origin, was converted to an unfair labor practice strike *ab initio* where the unfair labor practices relied upon to support the fiction of conversion did not occur until after the strike had already ended.

2. Whether the National Labor Relations Board properly ordered the Company to bargain where the bargaining order is based upon widely scattered and isolated unfair labor practices which were found to have occurred over a six month period of time.

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NATIONAL LABOR RELATIONS BOARD

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ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.,
*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

John Cuneo, Inc. (Company) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 18, 1982, enforcing an order of the National Labor Relations Board (Board) against the Company.

### OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A-1-A-30) is reported at 681 F.2d 11 (1982). The Decision and Order of the Board (Appendix B, *infra*, pp. A-31-A-76) is reported at 253 NLRB 1025 (1981).

## JURISDICTION

The decision of the court below issued on June 18, 1982, and judgment was entered that day. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. May the National Labor Relations Board declare that a strike, found by it to have been economic in origin, was converted to an unfair labor practice strike *ab initio* where the unfair labor practices relied upon to support the fiction of conversion did not occur until after the strike had already ended.

2. Whether the National Labor Relations Board properly ordered the Company to bargain where the bargaining order is based upon widely scattered and isolated unfair labor practices which were found to have occurred over a six month period of time.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §151, *et seq.*), are set forth in Appendix C., *infra* (p. A-76-A-78).

## STATEMENT OF THE CASE

In this case the Court of Appeals had before it two petitions for review, No. 81-1705 filed by petitioner Company, No. 81-1025 filed by the Union, as well as a cross-petition by the Board for enforcement of its order against the Company. A panel of the Court of Appeals enforced the Decision and Order of the Board in full and denied the petitions for review. (A-30) The Decision and Order of the Board, enforced by the Court of Appeals, found the Company to have been guilty of violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3), and (5). The Board ordered the

Company to cease and desist, to offer reinstatement with back pay to certain employees, and to bargain with the Union, retroactive to the date of commission of the first unfair labor practice after the Union had obtained a majority of the employees' authorizations. (Appendix B pp. A-40-A-44).

**A. The Facts.**

The Company designs, manufactures, and sells fire protection sprinkler systems at its place of business in Chattanooga, Tennessee (A-3). On September 15, 1977, Road Sprinkler Fitters Local Union No. 669 (Union) conducted an organizational meeting with the Company's employees. During that meeting, and later that day, a majority of the employees then employed signed authorization cards (A-3).

On September 16, 1977, the Union representatives visited the president of the Company and demanded recognition. The request was denied, and the Union was told to seek an election through Board processes (A-3).

**B. The Unfair Labor Practices Found.**

**1. Interrogation and threat of Gerald Hall.**

After the demand from the Union, the president called Gerald Hall into his office and questioned him about his union views and the organizational drive. Hall refused to talk (A-4). He was interrogated again later that day (A-4). On September 20, 1977, Hall was again called to the president's office, interrogated, and, according to the Board, threatened with discharge (A-4).

While the Company did not deny interrogating Hall, it asserted that he was a supervisor and, consequently, that no violation occurred. The supervisory status of Gerald Hall was litigated extensively. The basis for the Company's position that

Gerald Hall was a supervisor is contained in the testimony of witnesses called by the Company, the Board, and the Union (see A-78-A-83).

2. **Impression of surveillance.**

Also alleged as unfair labor practices were four incidents of alleged creation of the impression of surveillance. The first occurred on September 16, 1977, when the Company told a supervisor (who later joined the employees on strike) (A-5) to find out who had signed authorization cards (A-4). The violation was found to have occurred when this supervisor told an employee that the president had instructed him to find out who had signed cards (A-11).

On September 21, 1977, a recognitional strike began (A-5). After that, there were three incidents in which Company agents photographed picketers. Two incidents occurred on September 23 and one on October 14, 1977. The Company admitted taking the pictures. It explained its rationale for doing so as being (1) to obtain a picture of the employee and the vehicle involved in an incident of prior serious picket line misconduct for use by the Company to assist a non-striking replacement employee in identifying the perpetrator, and (2) to obtain photographic evidence in support of charges alleging violation of Sections 8(b)(4) and (7) of the Act (both of which may require proof that a union picketed). These photographing incidents were found to create the impression of surveillance based on the theory that such conduct is inherently destructive of employee rights (A-34; A-57-A-58). The ALJ rejected the Company's justification simply by stating "I do not accept Respondent's explanation" (A-57).

3. **Reinstatement.**

The strike lasted from September 21 to November 14, 1977. The above-recited unfair labor practices were the only ones found to have been committed prior to and during the period of the strike (A-6).

The Board, rejecting the findings of its ALJ, found that the strike was an economic strike in origin and was not caused by the unfair labor practices of the Company (A-35-A-36). When the strikers offered to return to work on November 14, as of that date they were economic strikers, entitled to immediate reinstatement to their former positions unless a permanent economic replacement had been hired. Otherwise, they were entitled to reinstatement only if a vacancy occurred (A-14).

The most egregious unfair labor practice found to have occurred was the Company's failure to reinstate the striking employees in a timely fashion (A-20). The case was tried under the theory that the strike was an unfair labor practice strike from its inception (A-65-A-66). When the theory was rejected by the Board, it fell back on the fact that a small number of strikers were not timely reinstated as evidencing the Company's anti-union animus. The fact of the matter is, no one even discovered this "egregious" act until some three years later when the matter was before the Board.

4. **February, 1978 unfair labor practices.**

The final unfair labor practices found to have occurred took place in February, 1978, when the Company adopted an allegedly discriminatory no-talking rule and a tardiness rule and enforced those rules against employees (A-16).

C. **The Board's Decision And Order.**

The Board affirmed the ALJ's findings that Gerald Hall was an employee and that the Company's interrogation and threats violated the Act, that the Company created the impression of surveillance through the statement of Supervisor Collins to an employee and through the three picture taking incidents, and that the February, 1978, promulgation and enforcement of rules was violative of the Act. The Board, however, refused to accept the ALJ's conclusion that the strike was an unfair labor practice

strike from its inception, holding instead that there was no causal relationship between the unfair labor practices committed on September 16 and 20 and the start of the strike (A-35-A-36).

Relying on its decision in *Drug Package Company, Inc.*, 228 NLRB 108 (1977), *enf'd as mod.*, 570 F.2d 1340 (8th Cir. 1978), the Board nevertheless held that the strike was in fact an unfair labor practice strike *ab initio*, because "when employees strike for recognition which should have been granted at the time they went on strike and where the employer engaged in contemporaneous widespread illegal conduct designed to frustrate the statutory scheme, and bargaining in particular, the striking employees were unfair labor practice strikers." By far, the unfair labor practice which was found to be the most egregious was the alleged untimely reinstatement of the strikers at the strike's end (A-36-A-37).

The Board ordered the Company to bargain with the Union, to post appropriate notices, to cease and desist, and to reinstate with back pay, as of November 14, 1977, certain strikers. The Board's bargaining order was made retroactive to September 16, 1977, the date of the first unfair labor practice following attainment of majority support (A-41-A-44).

D. **Court of Appeals.**

The Court of Appeals enforced the Board's order in its entirety, specifically approving the imposition of a retroactive bargaining order, and further endorsing the retroactive conversion of the economic strike into an unfair labor practice strike by subsequent unfair labor practices (A-30; A-22-A-30).

## REASONS FOR GRANTING THE WRIT

**The Decision Below Is A Significant Departure From Decisions Of This Court Pertaining To Reinstatement Rights Of Strikers, And Alters Well Established Principles Of Federal Labor Law Such That Review Is Appropriate.**

By imposing a retroactive bargaining order and holding that the employer had a duty to bargain from the date it committed its first unfair labor practice, and then holding that due to this "fiction," an economic strike was really an unfair labor practice strike makes a shambles of the doctrine of striker reinstatement rights as enunciated by this Court, and subordinates the favored policy of conducting elections to administrative convenience.

In this case, accepting, *arguendo,* the finding below that the first unfair labor practice occurred on the same day the majority union demanded recognition, at that point, although having violated the Act, such violation was not so serious as to warrant a bargaining order under the decision of *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969). Thus, in rejecting the Union demand for recognition the employer acted entirely within its right as set forth in *Linden Lumber Division* v. *NLRB,* 419 U.S. 301 (1974).

When the strike began on September 21, it began as an economic strike. The Board expressly rejected the ALJ's finding that the strike was begun in response to the employer's unfair labor practices. Nothing occurred during the strike to change it from an economic strike to an unfair labor practice strike. Consequently, for the entire duration of the strike, it must be concluded it remained an economic strike.

According to *Mackay Radio & Telegraph* v. *NLRB,* 304 U.S. 333 (1938), an employer has the right to hire permanent replacements for economic strikers and need not discharge

those replacements to rehire the strikers. Economic strikers are entitled to reinstatement to any vacancies which exist when they unconditionally offer to return to work, or to any vacancies resulting from departure of the replacements or expansion. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). As of November 14, 1977, when the strike ended, the strikers were entitled to the reinstatement rights of economic strikers and nothing more. Replacements would have the right to stay and no back pay would be due strikers rightfully refused reinstatement.

The Court of Appeals recognized this and struggled with the concept of retroactively making the strike an unfair labor practice strike. By far the most serious unfair labor practice found by the Board, failure to timely reinstate economic strikers, and the one violation which undoubtedly tipped the scales for the *Gissel* order, occurred after the strike ended. It cannot be possible, therefore, for a strike which was previously found to be economic, to be an unfair labor practice strike when the single unfair labor practice found by the Board to warrant the bargaining order had not occurred. The Board and Court of Appeals correctly concluded that in order for a strike to be an unfair labor practice strike, there must be a causal connection between the unfair labor practices and the strike, such that the strike is the direct outcome of the unfair labor practices. *NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir. 1978); *NLRB* v. *Colonial Haven Nursing Home, Inc.*, 542 F.2d 691 (7th Cir. 1976); *Typoservice Corp.*, 203 NLRB 1180 (1973).

Here there was no causal connection between the strike and the unfair labor practices, because the strike was over at the point the Employer committed the unfair labor practice which supposedly justified the bargaining order. It was what occurred *after* the strike ended, not what preceded or occurred during it, that caused the Board to conclude that the Employer should

have bargained upon demand. Up until the strike ended, though, the Employer acted lawfully in refusing recognition. In its zeal to undo the effects of the Union's tactical blunder, however, the Board, in holding that the strikers were unfair labor practice strikers, has favored the economic strikers over the replacements and ordered the replacements to be fired to make way for the strikers, thereby granting the strikers greater rights than those to which they are entitled under *Mackay Radio & Telegraph, supra.*

It would appear that the Board is adopting the retroactive bargaining order concept for sheer administrative convenience. In other situations, it is feasible to define a point at which the employer's conduct converts an economic strike into an unfair labor practice strike. See, *NLRB* v. *Pecheur Lozenge Co.*, 209 F.2d 393 (2d Cir. 1953), *cert. denied*, 347 U.S. 953 (1954); *National Car Rental System, Inc.* v. *NLRB*, 594 U.S. 1203 (8th Cir. 1979). Holding that a strike which starts and ends as an economic strike is really an unfair labor practice strike is, contrary to the Court of Appeals conclusion, a punitive measure, *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7 (1940). In situations where no strike occurs, making a bargaining order retroactive, probably has little or no practical effect. However, where a strike occurs, the bargaining order retroactively affects not only the employer, who might be liable for back pay even though when he refuses to reinstate the strikers he has not transgressed the limit prohibited by *Gissel*, such as occurred here, but also the lawful right of the strike replacements to keep their jobs, as distasteful as that may be to the Union.

The Board's retroactively making the strike an unfair labor practice strike has the additional effect of disenfranchising the strike replacements. It is well established that economic strike replacements are eligible to vote in representation elections. *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1680 (1960). Consequently, the unit of eligible voters was greatly expanded on the date the

strike ended. The Union could very well have lost its majority status before the employer committed the unfair labor practice which would have otherwise justified a *Gissel* bargaining order. See *Struthers-Dunn, Inc.* v. *NLRB,* 574 F.2d 796 (3d Cir. 1978). For this reason alone, once the retroactive bargaining order is overturned, the case should be remanded to the Board for consideration of this issue.

The Court should also consider whether the record as a whole contains substantial evidence to support the Board's bargaining order. *Gissel* makes clear that elections are by far the most favored method of selecting representatives. Here, as set forth in the facts, the employer was found to have committed several unfair labor practices, the most serious being the failure to reinstate strikers after the strike's end. The crucial piece of evidence on this matter was Respondent's Exhibit 11, which the ALJ did not rely upon and which the Board seized upon as being incomplete. The case was tried as an unfair labor practice strike caused by the unfair labor practices prior to September 21, 1977 (A-65-A-66). Respondent's Exhibit 11 was a summary of voluminous documentary evidence produced pursuant to subpoena. It was the subject of a three-hour off the record meeting. Everyone at the trial was satisfied. This was really not at issue at trial since the theory pursued was that the strikers were entitled to immediate reinstatement upon application. When this theory fell at the Board level, the untimely reinstatement issue was picked up by the Board to achieve the same result as the ALJ. Fundamental fairness requires a remand to reopen the hearing and allow further evidence on the crucial Exhibit 11. This was requested in the proceedings below and summarily denied (A-84-A-85).

## CONCLUSION

The Board and the court below have adopted a hocus pocus strategy to circumvent well established principles of labor law and to afford replaced economic strikers with greater rights than what has heretofore been permitted by this Court. It is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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September, 1982

## APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 81-1025

Road Sprinkler Fitters Local Union No. 669, Etc.,
Petitioner

v.

National Labor Relations Board, Respondent
John Cuneo, Inc., Intervenor

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No. 81-1705

John Cuneo, Inc., Petitioner

v.

National Labor Relations Board, Respondent
Road Sprinkler Fitters Local Union No. 669, U.A.,
Intervenor

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Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board

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Argued March 2, 1982

Decided June 18, 1982

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Ronald G. Ingham* for John Cuneo, Inc., petitioner in No. 81-1705 and intervenor in No. 81-1025.

*William W. Osborne, Jr.*, for Local No. 669, petitioner in No. 81-1025 and intervenor in No. 81-1705. *Angelo V. Arcadipane, Woody N. Peterson* and *Joan M. Darby* were on the brief for Local No. 669.

*Susan L. Dolin,* Attorney, National Labor Relations Board, with whom *Elliott Moore,* Deputy Associate General Counsel, and *Howard E. Perlstein,* Attorney, National Labor Relations Board, were on the brief, for respondent.

Before WALD, MIKVA and EDWARDS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* These consolidated petitions for review present a question of apparent first impression in the Courts of Appeals. The case arose out of complaints of employer unfair labor practices during a union organizational campaign in late 1977. Relying on its decision in *Drug Package Co.,* 228 N.L.R.B. 108 (1977), *enforced in part,* 570 F.2d 1340 (8th Cir. 1978), the National Labor Relations Board ("NLRB" or "Board") ruled that where a majority of employees have participated in a strike for union recognition and where the employer has engaged in contemporaneous and widespread illegal conduct that justifies the imposition of a retroactive bargaining order, the striking employees are entitled to reinstatement as unfair labor practice strikers as of the time when they made unconditional offers to return to work. For the reasons set forth below, we deny the petitions for review and grant enforcement of the Board's order.

## I. Background

### A. *The Union Organizational Campaign and the Ensuing Strike*[1]

John Cuneo, Inc. (the "Company") is a Tennessee corporation with an office and place of business in Chattanooga, where it designs, manufacturs and sells fire protection sprinkler systems. On September 15, 1977, Road Sprinkler Fitters Local Union No. 669 (the "Union") held an organizational meeting at the Chattanooga Ramada Inn. Union representatives met with eight of the Company's fourteen fabrication shop employees and distributed union authorization cards, which the eight employees read, signed and returned to the representatives. Later that day, three night-shift employees who had not attended the Ramada Inn meeting also signed union authorization cards.

The next day, union representatives met with Company President Bob Splawn. They informed him that a majority of the shop employees had selected the Union to represent them for the purposes of collective bargaining. Splawn refused to recognize and bargain with the Union and told the representatives to go to the National Labor Relations Board. Meanwhile, another union representative traveled to Atlanta, Georgia to file a representation petition with the Board's Regional Office.

Immediately after refusing the Union's demand for recognition, Splawn contacted the Company's labor counsel. Splawn then called Gerald Hall, the senior shop employee, into his office and questioned him about the organizational drive and

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[1] The summary of the facts underlying these consolidated cases is drawn from the Decision and Order of the Board and from the Decision of the Administrative Law Judge. *John Cuneo, Inc.*, 253 N.L.R.B. 1025 (1981). Following a careful review of the record, we hold that these factual findings are supported by substantial evidence. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

Hall's own views of the union activity. Hall declined to discuss the matter. Later that day, President Splawn again summoned Hall into his office, where Splawn and the Company's labor counsel interrogated Hall concerning his knowledge of the Union. The Company attorney also asked Hall a series of questions designed to establish his possible status as a supervisor and asked Hall to sign a statement saying that he was a supervisor. Hall refused to comment on the union or to sign the statement.

Following the second meeting with Hall, Splawn summoned Supervisor Ray Collins and asked him who had signed the authorization cards. When Collins replied that he did not know, Splawn directed him to find out. Shortly thereafter, Collins told Ted Hall, one of the shop employees, that Splawn had ordered him to find out what he could about the Union, including which employees had signed authorization cards.

On Tuesday, September 20, Gerald Hall was called into Splawn's office for a third meeting. President Splawn again attempted to persuade Hall to sign a statement saying that he was a supervisor. When Hall refused, Splawn threatened to discharge him. Hall responded that he would "just have to be fired" and left. After a Company supervisor followed Hall and confided that Splawn did not really wish to fire him, the meeting resumed. Hall eventually agreed to sign the statement after Splawn told Hall that the Company's employees would not benefit from union representation.[2]

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[2] Hall first read and signed a statement attesting only that he was a supervisor. Supervisor Izell later presented another statement to Hall. Izell told Hall that some words had been added reflecting that Hall might have influenced employees to sign the union authorization cards. Hall signed the second statement without reading it.

The Company lost the first statement and introduced only the second statement into evidence in the Board proceedings. The second statement clearly states that Hall had encouraged employees to sign authorization cards. In his testimony before the Administrative Law Judge ("A.L.J."), however, Hall denied encouraging any employee to sign an authorization card. The A.L.J. credited Hall's and the other employees' testimony rather than the second statement.

Meanwhile, on September 20, the shop employees met and agreed that if the Company refused to recognize the Union on the following day, they would strike. The next day, union representatives again demanded that Splawn recognize and bargain with the Union. Shortly after Splawn refused, eight of the ten bargaining unit employees working on the day shift walked out and began picketing the Company. Within an hour, President Splawn came to the picket line, counted the striking employees and announced that if they did not return to their jobs in fifteen minutes they would be permanently replaced. The employees ignored Splawn's declaration and continued to picket. Later that evening the strikers were joined by three of the night-shift employees and by Gerald Hall and Supervisor Coilins.

On September 22, Splawn hired a Pinkerton guard to observe the picket line. The guard and the Company's labor counsel each photographed the employees who were engaged in peaceful picketing on September 23. Subsequently, on October 14, another Company representative photographed a lone picketer at a secondary location.

Also on September 22, Splawn interviewed and hired two striker replacements. As the replacements were leaving the plant, striker Michael Green approached their car and threatened them. The replacements drove away, but Green and another person followed them in another car for about four miles. Green repeatedly drove past the replacements' car and then slowed to a halt in front of them in unsuccessful attempts to stop the replacements. When the replacements arrived at their destination, they called President Splawn and told him what had occurred.

On October 6, while the strike was still in progress, Green contacted Supervisor Izell about returning to work. Izell told Green that no positions were then available, but that he would be contacted when one opened up. On October 20, the Com-

pany sent Green a telegram advising him that a position was available and that he could return to work subject to discipline for any picket line misconduct. When Green arrived for work on October 24, two of the striker replacements identified him as one of the individuals who had threatened and followed them on September 22. Green also left work early on October 24 without notifying anyone. The next day Izell confronted Green with the information about the replacements' identification of him and with a query about his early departure from work on October 24. Following their meeting, Izell suspended Green pending investigation of his picket line activity and his asserted reason for leaving work. Green was later discharged when his explanation for leaving work early was not substantiated. Izell stated that Green's termination was due to his picket line misconduct, his early departure from work and his falsification of a reason for his departure.

The strike continued until November 14, when the Union forwarded to the Company seven strikers' unconditional offers to return to work.[3] None of the seven employees was immediately reinstated, however. Despite vacancies, the first two striking employees were not reinstated until February 1, 1978. One more striker was reinstated on February 20, 1978, and another on June 23, 1978. At the time of the hearing before the A.L.J., in September and November 1978, two of the employees still had not been offered reinstatement.

When the first two striking employees finally returned in February 1978, President Splawn told them that they should not talk about the Union on the job. In addition, these two employees were warned, pursuant to a newly adopted tardiness

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[3] One of the seven striking employees offering to return to work was Michael Green, who was ineligible for reinstatement due to his discharge for cause in October. Thus, the other six striking employees who sought reinstatement were the focus of the Board's concern about reinstatement. *See* Part II-C *infra*.

rule, that they would be discharged if they were late for work three times. After they were late twice, a Company Foreman told them that they had one more chance. The evidence in the case indicated that only the reinstated strikers were made subject to the new tardiness rule.

*B. The Proceedings Below*

Based on the Union's unfair labor practice charges, the General Counsel of the NLRB issued complaints against John Cuneo, Inc., alleging that the Company had violated sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Labor Management Relations Act (the "Act"), 29 U.S.C. § 158(a)(1), (3), (5) (1976), in its response to the union organizational campaign.

After several days of hearings, the A.L.J. found that the Company had violated section 8(a)(1) of the Act by interrogating employee Gerald Hall on three occasions, by threatening Gerald Hall with discharge if he failed to sign a statement saying that he was a supervisor, by creating the impression of surveillance of the employees' union activities through Supervisor Collins' conversation with Ted Hall, by engaging in surveillance through its photographing of employees participating in peaceful picketing, and by promulgating a rule prohibiting employees from engaging in union discussion at any time on Company premises. The A.L.J. also found that the Company had violated sections 8(a)(3) and 8(a)(1) by failing to reinstate economic strikers in a timely manner and by instituting and enforcing a new system of progressive discipline for tardiness in order to discourage Union membership. The A.L.J. further found that the Company had violated sections 8(a)(5) and 8(a)(1) by refusing, since September 16, 1977, to recognize and bargain collectively with the Union. On this point, the A.L.J. concluded that, because the employees were aware of the unfair labor practices that had occurred before September 21, the strike was an unfair labor practice strike from its inception. Finally, the A.L.J. dismissed the portions of the complaint

alleging that employee Green had been discriminatorily discharged in violation of sections 8(a)(3) and 8(a)(1) and that employee Gregg had been interrogated about Union activity in violation of section 8(a)(1).

The Board adopted each of the Administrative Law Judge's findings of violations of sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act, and affirmed the dismissal of the section 8(a)(1) and 8(a)(3) allegations relating to Green and Gregg. The Board, however, rejected the A.L.J.'s characterization of the strike as an unfair labor practice strike *from its inception*. Instead, the Board relied on its ruling in *Drug Package Co.*, 228 N.L.R.B. 108 (1977), and found that, although the strike commenced as one for recognition, it was converted to an unfair labor practice strike when the Company engaged in widespread unfair labor practices of sufficient seriousness to justify the imposition of a remedial bargaining order.

The Board ordered the Company to cease and desist from committing the unfair labor practices and from in any like or related manner interferring with, restraining or coercing its employees in the exercise of their rights under the Act. In agreement with the A.L.J.'s recommendation, the Board ordered the Company to recognize and, upon request, to bargain with the Union. The Board also ordered the Company to offer the six striking employees immediate and full reinstatement, discharging if necessary any persons hired to replace them, and to make these striking employees whole for any loss of earnings dating back to November 14, 1977, plus interest. Finally, the Board ordered the Company to rescind its newly adopted rule prohibiting employees from discussing the Union on Company premises at any time and its discipline system relating to employee tardiness.

In No. 81-1025 the Union petitions this court for review of the Board's dismissal of the portions of the complaint alleging that employee Green had been unlawfully discharged and

employee Gregg unlawfully interrogated. In No. 81-1705 the Company petitions for review of those portions of the Board Decision and Order that found that the Company had violated sections 8(a)(1), 8(a)(3) and 8(a)(5) and that ordered the Company to bargain with the Union.[4] On July 14, 1981, this court ordered *sua sponte* that No. 81-1025 and No. 81-1705 be consolidated for review on the merits. The Board has cross-applied for full enforcement of its Order.[5]

## II. Analysis Of The Unfair Labor Practices

We have little difficulty disposing of the challenges to the various unfair labor practices found by the Board. As noted earlier, *see* note 1 *supra,* our review of the record reveals that the Board's factual findings are supported by substantial evidence on the record as a whole and are therefore conclusive. 29 U.S.C. § 160(e), (f) (1976). Moreover, the Board's legal conclusions based on its factual findings are consistent with settled precedent. Accordingly, for the reasons set forth below, we affirm the Board's conclusions with respect to each of the unfair labor practice charges.[6]

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[4] The Company originally petitioned for review in the United States Court of Appeals for the Sixth Circuit. Its petition was transferred to this court by Order of the Sixth Circuit on June 19, 1981.

[5] The court has jurisdiction pursuant to sections 10(e) and 10(f) of the Act. 29 U.S.C. § 160(e), (f) (1976).

[6] The Board dismissed the portions of the complaint concerning Green's discharge after his return to work and the alleged interrogation of another employee, Gregg. Serious picket line misconduct, of course, may serve to waive a striking employee's right to reinstatement. *E.g., NLRB* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939). The Board's conclusion in this case that Green's misconduct, plus his unexplained early departure from work, were serious enough to warrant discharge is legally justified. We therefore decline to set it aside.

A. *Interrogations and Threatened Discharge of Employee Gerald Hall*

The Company does not dispute that coercive interrogation of employees concerning union activites, under circumstances like those involved in the three interrogations of Gerald Hall, violates section 8(a)(1) of the Act. *E.g., Midwest Regional Joint Board, Amalgamated Clothing Workers* v. *NLRB,* 564 F.2d 434, 443 (D.C. Cir. 1977); *Teamsters Local 633* v. *NLRB,* 509 F.2d 490, 493-95 (D.C. Cir. 1974). Nor does the Company contest that the threatened discharge of an employee for union activities is an unfair labor practice prohibited by section 8(a)(1). *E.g., NLRB* v. *Maywood Plant of Grade Plastics,* 628 F.2d 1, 3 (D.C. Cir. 1980) (per curiam). The Company contends, however, that the Board erred in finding that the interrogations and threatened discharge of Hall violated section 8(a)(1) because Hall is a supervisor and is therefore unprotected by the provisions of section 8(a)(1).

The Board adopted the A.L.J.'s finding that Hall was an employee, and not a supervisor, within the meaning of the Act. *John Cuneo, Inc.,* 253 N.L.R.B. 1025, 1027, 1031-32 (1981); *see* 29 U.S.C. § 152(3), (11) (1976). The factual judgment of supervisory status, of course, "lies . . . squarely within the Board's ambit of expertise." *Oil, Chemical & Atomic Workers* v.

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The Union argues that the reasons given for Green's discharge were merely pretextual and disguised an anti-union motivation. The only evidence supporting this argument, however, was the testimony of employee Gregg. The A.L.J. discredited Gregg's testimony, and we can find no basis upon which to overrule the A.L.J.'s credibility determination. *See, e.g., Truck Drivers Local 705* v. *NLRB,* 509 F.2d 425, 426 (D.C. Cir. 1974) (per curiam); *International Bhd. of Teamsters* v. *NLRB,* 435 F.2d 416, 417 (D.C. Cir. 1970) (per curiam). Similarly, the only evidence supporting the dismissed interrogation charge was Gregg's own discredited testimony. Lacking any sound reason to question the A.L.J.'s credibility findings, we refuse to set aside the Board's dismissal of these two unfair labor practice charges.

*NLRB*, 445 F.2d 237, 241 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). In the present case, we find the Board's judgment supported by substantial record evidence and fully consistent with applicable precedent. *See, e.g., Oil, Chemical & Atomic Workers* v. *NLRB*, 445 F.2d at 240-44; *Amalgamated Clothing Workers* v. *NLRB*, 420 F.2d 1296, 1300 (D.C. Cir. 1969) (per curiam). We therefore decline to set aside the Board's determination that Gerald Hall was an employee within the meaning of the Act, *see NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944), and that the interrogations and threatened discharge were therefore unfair labor practices prohibited by section 8(a)(1).[7]

B. *Company Surveillance of the Employees' Union Activities*

The Company does not contest the Board's finding that it created an impression of surveillance of the employees' union activities when Supervisor Collins was directed to find out which employees had signed authorization cards and then interrogated one employee. The Board correctly concluded that creating an impression of surveillance violated section 8(a)(1). *E.g., UAW* v. *NLRB*, 455 F.2d 1357, 1367-68 (D.C. Cir. 1971).

In addition, the Board concluded that the Company violated section 8(a)(1) on three separate occasions by taking pictures of its employees engaged in peaceful picketing. The Board concedes that an employer may validly photograph a picket line to

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[7] Even if the Company erroneously believed that Hall was a supervisor, its interrogations and threat violated § 8(a)(1). The employer's intent to interfere with employee rights is not a necessary element of the unfair labor practice. *E.g., NLRB* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964). As the First Circuit recognized, "[t]he right of employees to engage in activity guaranteed by Section 7 of the Act should not be subject to defeasance merely because the employer believes he is not violating the Act in restraining the employee in his exercise of such rights." *NLRB* v. *Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941, 945-46 (1st Cir. 1961).

substantiate picket line misconduct or to gather evidence for use in injunctive or unfair labor practice proceedings. *See, e.g., NLRB* v. *Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 700-02 (7th Cir. 1976). The Board and the courts have long recognized, however, that picket line photography has the tendency to interfere with, restrain, or coerce employees engaged in protected concerted activity. *See, e.g., Larand Leisurelies, Inc.* v. *NLRB*, 523 F.2d 814, 819 (6th Cir. 1975); *UAW* v. *NLRB*, 455 F.2d at 1368; *Flambeau Plastics Corp.*, 167 N.L.R.B. 735, 742-43 (1967), *enforced*, 401 F.2d 128 (7th Cir. 1968), *cert. denied*, 393 U.S. 1019 (1969). Accordingly, an employer must have "a solid justification" for its photography of employee picketing. *NLRB* v. *Colonial Haven Nursing Home, Inc.*, 542 F.2d at 701. In this case we find no basis for setting aside the Board's finding that the Company lacked such justification for its photography and its conclusion that the Company's activity therefore violated section 8(a)(1).[8]

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[8] The Company claims that it took pictures in order to identify picket line misconduct and points to the identifaction of Green as one of the pursuers of two replacement employees. The photographs, however, were taken of *peaceful* picketing, and the employees were not informed of the allegedly limited purpose. In addition, in one case photographs were taken over three weeks after the only reported incident of picket line misconduct. In these circumstances, we agree with the Board's judgment that the photographs had an inherent tendency to interfere with the exercise of protected employee rights. *See Kallman (Love's Barbeque Restrauant No. 62)*, 245 N.L.R.B. 78, 124 (1979), *enforced in relevant part*, 640 F.2d 1094, 1098 (9th Cir. 1981).

The Company also claims that the photographs were taken for the purpose of filing unfair labor practice charges against the Union under §§ 8(b)(4)(B) and 8(b)(7)(C) of the Act, 29 U.S.C. § 158(b)(4)(B), (b)(7)(C) (1976). The Board properly rejected this claim as well. The Company withdrew its § 8(b)(4) charge, and the § 8(b)(7) charge lacked merit because the Union had filed a timely representation petition.

C. *Delayed Reinstatement of the Returning Strikers*

The A.L.J. found that the employees who struck the Company on September 21 "were aware of [the] unfair labor practices prior to the strike." *John Cuneo, Inc.*, 253 N.L.R.B. at 1035. The A.L.J. therefore concluded that the strike which followed resulted both from the employer's refusal to bargain and from the pre-strike unfair labor practices. On this basis, the A.L.J. characterized the strike as an unfair labor practice strike from its inception. The Board rejected this characterization, stating: "Board law holds that an unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather, there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices." *John Cuneo, Inc.*, 253 N.L.R.B. at 1026. The Board found nothing in the record to indicate that the employees were striking for any reason other than to gain recognition of the Union as their bargaining representative.

We agree with the Board's characterization of the strikers' initial purpose as recognition. A lawful strike for union recognition is an economic strike, unless unfair labor practices committed by the employer are a "contributing cause" of the strike. Mere awareness of unfair labor practices is insufficient to establish this causal connection. *E.g., NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898, 906 (5th Cir. 1978); *NLRB* v. *Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 704 (7th Cir. 1976). The Board fairly read the record here when it concluded that the employees' purpose in striking the Company was only to gain recognition for the Union and not to redress the unfair labor practices that had occurred before September 21, 1977.[9]

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[9] The Company's refusals to recognize the Union on September 16 and again on September 21 were not *by themselves* unfair labor practices. As long as the Company did not commit other unfair labor practices that impaired the electoral process, it had the right to refuse recognition and to demand that the Union petition for an election to demonstrate its majority status. *Linden Lumber Div.* v. *NLRB*, 419 U.S. 301 (1974).

For our present purposes, the rights of the strikers to reinstatement after their unconditional offer to return to work on November 14 were therefore the rights of *economic strikers.*[10] As economic strikers, the employees were not entitled to immediate reinstatement if they had been permanently replaced by substitute workers hired during the strike. *E.g., NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). On the other hand, the strikers were entitled to reinstatement to any vacancies existing when they made their unconditional offers to return or to any vacancies resulting from a subsequent departure of permanent replacements or from an expansion of the Company's operations. *E.g., NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967); *Retail, Wholesale & Department Store Union* v. *NLRB*, 466 F.2d 380, 387-88 (D.C. Cir. 1972); *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1368-70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). The employer bears the burden of showing that the economic strikers were permanently replaced and that no jobs subsequently became available, or that other legitimate business reasons existed for denying reinstatement. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378; *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34-35 (1967); *Laidlaw Corp.*, 171 N.L.R.B. at 1369.

The Board found that the Company failed to carry its burden regarding the reinstatement of the striking employees in this case. By its own admission, the Company's evidence was incomplete and did not even indicate the total number of bargaining unit employees on the payroll on and after November 14.

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[10] Our sole concern here is whether the Company committed any unfair labor practices with respect to the reinstatement of the striking employees. We therefore consider whether the Company accorded its employees the reinstatement rights of economic strikers. In Part III-C *infra* our concern is the appropriate remedy, not only for the Company's failure to properly reinstate economic strikers, but for all of the Company's unfair labor practices. *See* Part III-C *infra.*

Moreover, the Company's own records indicate that new shop employees were hired on November 25 and on January 17, and that two replacement employees quit on November 30. Despite these four proven vacancies, the evidence reveals that no striking employee was reinstated until February 1.[11] Thus, in addition to the Company's failure to prove that the economic strikers had been permanently replaced and that no vacancies existed *on November 14,* the unrefuted evidence also indicates that the Company did not promptly offer reinstatement to striking employees as jobs became available *after November 14.*[12]

D. *Institution of a "No-Union-Talk" Rule*

When the first two striking employees were finally reinstated in February 1978, President Splawn told them that they should not talk about the Union on the job. It is well settled that 'the right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital* v. *NLRB,* 437 U.S. 483, 491 (1978). Accordingly, absent a showing of special circumstances by the employer, restrictions on union solicitation during nonworking time are invalid. *E.g., id.* at 492-93; *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793 (1945). The restriction in this case was not

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[11] Two economic strikers—both of whom had offered to return on November 14—were recalled to work on February 1. Two other employees were reinstated on February 20 and June 23. The two remaining employees who had sought to return to work had not been reinstated as of the time of the A.L.J. hearing in September 1978. The Company's exhibits reveal a number of vacancies prior to that time.

[12] Because of the Company's failure to prove the absence of available vacancies, and because of the Board's remedial order in the case, which we approve, it is unnecessary to ascertain the exact dates of available vacancies. It suffices that the striking employees were not offered timely reinstatement and that the Company therefore repeatedly violated the Act.

limited to working time and was otherwise inadequately justified by the Company. President Splawn's only explanation—that he wanted to "keep peace in the work place"—was vague and conclusory, and the rule apparently applied only to pro-union discussions. Given the discriminatory application of the rule and other evidence of the Company's anti-union bias, we have no difficulty upholding the Board conclusion that the no-union-talk rule was adopted for the purpose of discouraging union activity and interfered with employee rights in violation of section 8(a)(1). *See United Steelworkers* v. *NLRB,* 393 F.2d 661, 663 (D.C. Cir. 1968).

E. *Promulgaton and Discriminatory Application of a Progressive Discipline System*

In addition to the "no-union-talk" rule, the Company promulgated a new disciplinary system for tardiness when the first two striking employees returned in February 1978. Even though the Company previously had no established policy with respect to employee tardiness, the returning strikers were warned that they would be discharged if they were late for work three times. The Board found, and we have no reason to question, that the Company instituted the progressive discipline system for employee tardiness in order to discourage union membership. The Board thus properly concluded that the implementaton of the new work rule violated sections 8(a)(1) and 8(a)(3). *E.g., International Union of Electrical, Radio & Machine Workers* v. *NLRB,* 440 F.2d 298 (D.C. Cir. 1970) (per curiam). In addition, substantial evidence on the record supports the Board's finding that the new work rule was discriminatorily applied against union supporters in violation of sections 8(a)(1) and 8(a)(3). *See, e.g., McGraw-Edison Co.* v. *NLRB,* 533 F.2d 1266 (D.C. Cir. 1976).

## III. The Appropriate Remedy

The Company does not challenge the Board's Order to the extent that it requires traditional cease-and-desist and notice-posting remedies for the Company's unfair labor practices. The Company does, however, contest the bargaining order imposed by the Board. In addition, the Board's characterization of the striking employees as *unfair labor practice strikers* for remedial purposes presents an issue of apparent first impression in the Courts of Appeals. We now turn our attention to these remaining questions.

### A. *The Bargaining Order*

In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held that the Board may order an employer to bargain with a union even though the union has failed to establish majority support in a Board representation election. The Court enunciated three prerequisites to the issuance of a *Gissel* bargaining order:[13] (1) the union achieved majority support within an appropriate bargaining unit, *id.* at 614; (2) the employer engaged in unfair labor practices that had "the tendency to undermine majority strength and impede the election process," *id.;* and (3) "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order," *id.* at 614-15. *See also Amalgamated Clothing Workers* v. *NLRB*, 527 F.2d 803, 806-07 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976). The Board concluded that these conditions were satisfied in the present case.

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[13] Throughout this opinion, "*Gissel* bargaining order" refers to the second category of bargaining orders mentioned in the *Gissel* opinion—those orders issued after an employer's unfair labor practices undermine a union's majority strength. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. at 613-15.

1. *The Validity of the Authorization Cards*

In this case, the Board determined that the Company's fabrication shop employees constitute an appropriate bargaining unit under section 9(b) of the Act. 29 U.S.C. § 159(b) (1976). This unit included fourteen employees in September 1977, eleven of whom signed union authorization cards. The Company challenges the validity of this card majority, however, contending that certain employees were told that the cards would be used to obtain a Board election. The Company argues that the cards therefore cannot be used to establish majority support for the Union.

The Company's challenge to the validity of the cards falls short. The cards that the employees signed were unambiguous, single-purpose cards which "authorize [the Union] to represent [the signatory] in collective bargaining negotiations on all matters pertaining to rates of pay, hours or any other condition of employment." Jt. App. 100-07, 118-20. "Where cards are so plain on their face in designating the Union as bargaining agent, their validity can be undercut only if they were solicited by representations that the only purpose was to obtain an election, or there is some other clear evidence of 'gross misstatement' that would undermine the validity of a signed authorization card." *Amalgamated Clothing Workers* v. *NLRB*, 420 U.S. 1296, 1301 (D.C. Cir. 1969) (per curiam) (footnote omitted); *see NLRB* v. *Gissel Packing Co.*, 395 U.S. at 601-10. The evidence presented to the Board in this case did not establish that Union representatives told employees that the sole purpose of the authorization cards was to obtain an election.[14] Nor was there

[14] The fact that Union representatives told employees that the cards might also be used to obtain a Board election does not preclude their use to establish employee support for the Union. The Supreme Court explained in *Gissel Packing:*

> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is

evidence of "gross misstatements" which would negate the cards' plain, unambiguous language. We therefore uphold the Board's conclusion that the authorization cards in this case were reliable indicators of majority support for the Union.[13]

2. *The Seriousness of the Unfair Labor Practices*

The Board also concluded that the unfair labor practices committed by the Company "were sufficiently serious and pervasive in character to preclude the holding of a fair election and to warrant the issuance of a bargaining order." *John Cuneo, Inc.*, 253 N.L.R.B. at 1027; *see also id.* at 1036 (A.L.J. Decision). The Company contests the Board's conclusion.

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> nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases; the union will still have to have the signatures of 30% of the employees when an employer rejects a bargaining demand and insists that the union seek an election.

395 U.S. at 606-07 (footnote omitted).

[13] The Company also contends that the cards were improperly obtained through the influence of a Company Supervisor, Gerald Hall, and hence cannot be considered as representative of employee sentiment. We need not consider this argument, since we have upheld the Board's determination that Hall was an employee, not a supervisor. *See* Part II-A *supra*.

Finally, we note that *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 674 F.2d 197 (3d Cir. 1982), which the Company submitted for our consideration after oral argument in this case, is clearly distinguishable. Even if we were to accept the Third Circuit's position that the General Counsel must prove that each employee read the authorization card before signing it, *id.* at 201-02; *but cf. NLRB* v. *Gissel Packing Co.*, 395 U.S. at 608 ("We . . . reject any rule that requires a probe of an employee's subjective motivations."), that requirement was satisfied here. The A.L.J. in this case found that the employees read the authorization cards, *John Cuneo, Inc.*, 253 N.L.R.B. at 1031, and there is no evidence that any statements by Union representatives contradicted the plain language of the cards.

We have no difficulty deciding that the Company's unfair labor practices in this case had the tendency to undermine majority strength and impede the electoral process. Court and board cases often have viewed unfair labor practices similar to the ones in this case—interrogation, threatened discharge, surveillance, discriminatory application of work rules—as conduct which supports the issuance of a bargaining order. *See, e.g.*, Comment, *A Reappraisal of the Bargaining Order: Toward a Consistent Application of NLRB* v. *Gissel Packing Co.*, 69 Nw. U.L. Rev. 556, 565-78 (1974); Note, *The* Gissel *Bargaining Order, the NLRB, and the Courts of Appeals: Should the Supreme Court Take a Second Look?*, 32 S.C.L. Rev. 399, 411-14 (1980). In addition, the Company's delayed reinstatement of the striking employees was a particularly serious unfair labor practice. As the Board noted, two strikers "were, in essence, discharged since they were never offered their jobs back." *John Cuneo, Inc.*, 253 N.L.R.B. at 1027. Four other strikers were constructively suspended since they "were not offered reemployment until months after [the Company] had begun filling vacancies that occurred following the request to return to work." *Id.* These constructive discharges and suspensions, especially when coupled with the other unfair labor practices committed by the employer, plainly satisfy the second prerequisite to a *Gissel* bargaining order.[16]

3. *The Appropriateness of the Bargaining Order Remedy*

The final prerequisite to the issuance of a bargaining order—i.e., the finding that, due to the employer's serious and pervasive unfair labor practices, the possibility of ensuring a fair election is slight and employee sentiment would, on balance, be better protected by a bargaining order—is a determination largely within the special competence of the Board. The Supreme Court noted in *Gissel* that:

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[16] As was aptly noted in *NLRB* v. *Sitton Tank Co.*, 467 F.2d 1371, 1372 (8th Cir. 1972) (per curiam): "The surest method of undermining a union's majority or impeding an election process is to discharge all the pro-union employees . . . ."

> It is for the Board and not the courts . . . to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its rememdies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

*NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). *See also Pedro's, Inc.* v. *NLRB*, 652 F.2d 1005, 1011-12 (D.C. Cir. 1981) (remanding case for determination of appropriate remedy after rejecting one unfair labor practice finding).

In the present case we cannot say that the Board abused its remedial discretion. First, the litany of unfair labor practices supports the Board's conclusion that "almost from the moment it learned of its employees' support for the Union, [the Company] embarked on an unlawful course of conduct designed to stifle further union activity." *John Cuneo, Inc.*, 253 N.L.R.B. at 1027; *see* Part II *supra*. Second, the Board properly considered the relatively small size of the bargaining unit. While the effect of the Company's conduct arguably might have been diluted if it had involved only a small number of employees in a large bargaining unit, the anti-union conduct in this case was highly magnified in a unit limited to fourteen persons. *See, e.g., Ann Lee Sportswear, Inc.* v. *NLRB*, 543 F.2d 739, 744 (10th Cir. 1976) (twenty-employee bargaining unit); *NLRB* v. *Scoler's Inc.*, 466 F.2d 1289, 1291 (2d Cir. 1972) (interrogation of six employees out of nineteen in bargaining unit). Moreover, a majority of the Company's employees was subject to one or more serious unfair labor practices. *Cf. NLRB* v. *Kostel Corp.*, 440 F.2d 347, 352 (7th Cir. 1971) (threats and interrogations involving three employees in a bargaining unit of five).

We therefore uphold the Board's bargaining order. As this court has previously noted: "*Gissel* does not require a finding that no other remedy could suffice, only that the bargaining order better protects employees' expressed union preference."

*Amalgamated Clothing Workers* v. *NLRB*, 527 F.2d 803, 807 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976). That standard is met here, given the Union's valid card majority in an appropriate bargaining unit and the Company's serious and pervasive unfair labor practices.

B. *Retroactivity of the Bargaining Order*

The Board concluded that the Company violated section 8(a)(5) of the Act by withholding recognition from the Union on September 16, 1977, and ordered the Company to bargain retroactively from that date. *John Cuneo, Inc.*, 253 N.L.R.B. at 1027. Since its decision in *Trading Port, Inc.*, 219 N.L.R.B. 298 (1975), the Board has consistently made *Gissel* bargaining orders retroactive, rather than effective only from the date of the Board Decision and Order.[17] The Board adopted this policy upon recognition that prospective bargaining orders

> [i]n some instances . . . left unremedied an employer's unilateral changes in working conditions made after a union had established its majority status. . . . This led to the unwanted result that an employer, by committing serious unfair labor practices, could delay the holding of an election indefinitely (since a fair one could no longer be held), and insure himself a substantial period of time until the Board issued a remedial bargaining order, during which period he would not have to deal with a union. Since the events which "triggered" the bargaining duty occurred much earlier, i.e., at the time of the unfair labor practices, and since the employees had earlier expressed their desire for union representation, the Board's prospective bargaining order fell short of reinstating the situation as it would have been had Respondent obeyed the law and allowed a fair election to proceed.

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[17] In *Trading Port* the Board overruled the prospective-only bargaining order policy it had announced in *Steel-Fab, Inc.*, 212 N.L.R.B. 363 (1974).

*Trading Port, Inc.*, 219 N.L.R.B. at 301. *Cf. International Union of Electrical, Radio & Machine Workers* v. *NLRB (Tiidee Products, Inc.)*, 426 F.2d 1243, 1248-49 (D.C. Cir.) (prospective bargaining order inadequate remedy for "brazen refusal to bargain" after union election victory), *cert. denied*, 400 U.S. 950 (1970).

Three circuits have explicitly considered and enforced retroactive, as opposed to prospective only, bargaining orders. *See Alumbaugh Coal Corp.* v. *NLRB*, 635 F.2d 1380, 1386 (8th Cir. 1980); **Hedstrom Co.** v. *NLRB*, 629 F.2d 305, 318-19 (3d Cir. 1980) (en banc), *cert. denied*, 450 U.S. 996 (1981); *Ann Lee Sportswear, Inc.* v. *NLRB*, 543 F.2d 739, 744 (10th Cir. 1976). We also approve the issuance of retroactive bargaining orders where, as here, the union had majority support within the bargaining unit, the employer refused to bargain with the union, and the employer engaged in serious and pervasive unfair labor practices sufficient to justify a bargaining order under *Gissel*. In this case, therefore, the Board was justified in making its bargaining order retroactive to September 16, 1977, the date on which the Union, having attained majority support, demanded recognition and on which the Company rejected the demand and embarked on its course of unlawful conduct.[19]

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[19] The Union achieved majority status on September 15, one day before it demanded recognition. The Board and the courts have followed the rule that bargaining orders are retroactive to the *later* of the date on which the union achieved majority status and the date on which the employer commenced its unfair labor practices. *See, e.g., Alumbaugh Coal Corp.* v. *NLRB*, 635 F.2d 1380, 1386 (8th Cir. 1980) (bargaining order retroactive to date union obtained majority support where unfair labor practices began earlier); *NLRB* v. *Eagle Material Handling, Inc.*, 558 F.2d 160, 168 (3d Cir. 1977) (bargaining order retroactive to date employer commenced unlawful conduct where union earlier had majority support); *Drug Package Co.*, 228 N.L.R.B. 108, 111 (1977), *enforced in part*, 570 F.2d 1340 (8th Cir. 1978); *Frito-Lay, Inc.*, 232 N.L.R.B. 753, 755 n.8 (1977), *enforced in part*, 585 F.2d 62 (3d Cir. 1978). This rule is grounded on the dual requirements of union majority status and serious employer unfair labor practices

C. *Reinstatement of the Striking Employees Under Drug Package*

In *Drug Package Co.*, 228 N.L.R.B. 108 (1977), the employer rejected a demand for recognition by a union that had a valid card majority. Beginning before the union demanded recognition, and continuing after it, the employer engaged in serious unfair labor practices that undermined the union majority. Two weeks after the union demand, the employees struck for recognition. Relying on its *Trading Port* decision, the Board issued a bargaining order retroactive to the date that the union evidenced majority support and demanded recognition. The Board further held that the employees who struck for recognition were unfair labor practice strikers and therefore entitled to reinstatement upon their unconditional offer to return to work.

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before a *Gissel* bargaining order may issue. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 614 (1969); *cf. Struthers-Dunn, Inc.* v. *NLRB*, 574 F.2d 796 (3d Cir. 1978) (bargaining order inappropriate where union lost majority support before employer commenced unfair labor practices).

Because the Union demanded recognition in this case, we need not decide whether a retroactive bargaining order may issue inthe absence of such a demand. *See, e.g., NLRB* v. *Daybreak Lodge Nursing & Convalescent Home, Inc.*, 585 F.2d 79 (3d Cir. 1978); *Beasley Energy, Inc. (Peaker Run Coal Co.)*, 228 N.L.R.B. 93 (1977). Further, because the Union's demand for recognition in this case was made on the same day that the Company embarked on its unlawful course of conduct, we need not decide whether a bargaining order may be made retroactive to a date prior to the demand for recognition if the union's majority status and the employer's unfair labor practices antedated the demand for recognition. *See, e.g., Cas Walker's Cash Stores Inc.*, 249 N.L.R.B. 316 (1980), *enforced*, 659 F.2d 79 (6th Cir. 1981); *Albertson Mfg. Co.*, 236 N.L.R.B. 663 (1978). *See generally* Walther & Douglas, *NLRB Bargaining Orders: A Problem-Solving or Ivory Tower Approach to Labor Law?*, 17 WASHBURN L.J. 1, 12-25 (1977).

Those strikers who had not been promptly reinstated were awarded backpay plus interest.[19] *See Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 278 (1956).

The Board relied on its *Drug Package* decision to characterize the striking employees in the present case as unfair labor practice strikers. On this point, the Board opinion stated: " '[W]hen employees strike for recognition which should have been granted at the time they went on strike and where the employer engaged in contemporaneous widespread illegal conduct designed to frustrate the statutory scheme, and bargaining in particular, the striking employees are unfair labor practice strikers.' " *John Cuneo, Inc.,* 253 N.L.R.B. at 1026 (quoting *Drug Package Co.,* 228 N.L.R.B. at 112). The factual circumstances of *Drug Package* and of the present case are indistinguishable—in both cases the employer rejected a demand for recognition by a majority union and committed unfair labor practices justifying a *Gissel* bargaining order; following the employer's rejection, the employees struck for recognition. The propriety of the Board's reinstatement order in this case therefore depends upon the validity of the so-called *Drug Package* doctrine.

In one sense, the treatment of striking employees as unfair labor practice strikers under the circumstances of *Drug Package* and of this case follows by simple logic from the imposition of a retroactive bargaining order. Concomitant with the imposition

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[19] The Eighth Circuit denied enforcement of the retroactive bargaining order. *Drug Package, Inc.* v. *NLRB,* 570 F.2d 1340 (8th Cir. 1978). The court held that enforcement would have been unfair to the employer in that case because the employer's conduct and the A.L.J. hearing in *Drug Package* both antedated the Board's *Trading Port* decision and because the NLRB General Counsel had not fully litigated a §8(a)(5) charge. The Eighth Circuit has since enforced retroactive bargaining orders where these concerns were not present. *Alumbaugh Coal Co.* v. *NLRB,* 635 F.2d 1380, 1386 (8th Cir. 1980). The Company cannot make a similar claim of unfairness here.

of the retroactive bargaining order is a conclusion that the employer's refusal to recognize and bargain with the majority union was a violation of section 8(a)(5). *See John Cuneo, Inc.*, a violation of section 8(a)(5). *See John Cuneo, Inc.*, 253 N.L.R.B. at 1027; *Drug Package Co.*, 228 N.L.R.B. at 111 & n.21. Since the employer committed an unfair labor practice in its refusal to recognize the union, and since the employees then struck for recognition, the employees' "absence from the workplace [was] prompted by employer conduct that [was] found to constitute an unfair labor practice," *Teamsters Local 115* v. *NLRB*, 640 F.2d 392, 394 (D.C. Cir.), *cert. denied*, 102 S. Ct. 119, 102 S. Ct. 141 (1981). Hence, the employees were unfair labor practice strikers.

The logical application of established remedial principles is not the sole justification for the Board's *Drug Package* doctrine. The *Drug Package* doctrine is also warranted by well-recognized policies of the Act, which provide both a union and an employer certain limited, lawful options prior to a Board election or a voluntary recognition of a majority union.

Under the Act, an employer has no automatic duty to bargain with a union that claims to have signed authorization cards from a majority of the employees in an appropriate bargaining unit. The employer may, regardless of motive, refuse a demand for recognition based on a card majority and compel the union to petition for a secret-ballot election to demonstrate its majority status. *Linden Lumber Division* v. *NLRB*, 419 U.S. 301 (1974). An employer who rejects a demand for recognition may not, however, use the time preceding the election to commit unfair labor practices in an attempt to destroy the union's majority. *Linden Lumber Division* v. *NLRB*, 419 U.S. at 310; *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 600 (1969). If the employer engages in unlawful conduct that impedes the electoral process, the employer "forfeits [its] right to demand an election," *NLRB* v. *Prineville Stud Co.*, 578 F.2d 1292, 1296 (9th Cir. 1978), and may be ordered to bargain with the union,

*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 614-15. *See Amalgamated Clothing Workers* v. *NLRB*, 527 F.2d 803, 806 n.4 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976); *Drug Package Co.*, 228 N.L.R.B. at 111.

If the employer refuses to bargain on the basis of the union's card majority, the union may strike for recognition, subject to the restrictions of section 8(b)(7)(C) of the Act. 29 U.S.C. § 158(b)(7)(C) (1976).[20] The union may hope that a visible display of majority support on the picket line and economic pressure on the employer will shorten the route to recognition and bargaining. Still, as long as the employer does not unlawfully attempt to undermine the union's support, it is not required to recognize the union and may insist on an election. *See Linden Lumber Division* v. *NLRB*, 419 U.S. at 306. In addition, the employer may permanently or temporarily replace employees engaged in an economic strike. *See* text accompanying notes 10-12 *supra*.

If the employer exceeds its legal rights and embarks on an unlawful campaign to undermine the union's support, it may injure the employees' protected interests in at least two distinct ways. First, the employer's unfair labor practices may prevent the employees from freely expressing their union preferences in a Board conducted election. An impairment of employee free choice, assured by section 7 of the Act, 29 U.S.C. § 157 (1976), may justify the imposition of a *Gissel* bargaining order. As the Board stated in *Drug Package:* "The legal basis for so bypassing the election procedure is simply that the employer's own misconduct has created conditions which now preclude the conducting of a fair election." 228 N.L.R.B. at 111.

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[20] Under §8(b)(7)(C) a union may not engage in recognition picketing for an unreasonable time, not to exceed thirty days, without filing a representation petition with the Board. Thus, §8(b)(7)(C) also channels the parties toward the use of a Board election to settle unresolved representation disputes.

Second, the employer's illegal conduct may cause excessive economic harm to employees who have participated in a lawful strike for recognition. As noted above, when a union demands recognition, the employer has two lawful options. The employer may recognize and bargain with the union, in which case no strike for recognition will follow. Alternatively, the employer may refuse to recognize the union and await the outcome of a Board election. If the employer does not impede the electoral process, the recognitional strike should last no longer than the date of the election.[21] If, however, the employer rejects these lawful alternatives and undermines or prevents an election, the strike likely will be prolonged as a consequence of activity that is clearly forbidden by the Act. In other words, the employees' continued strike, and continued loss of earnings, would result directly from their employer's illegal conduct.

Just as a *Gissel* bargaining order may be an appropriate remedy for the impairment of employee free choice caused by an employer's unfair labor practices, the treatment of striking employees as unfair labor practice strikers under *Drug Package* may be an appropriate remedy for the harm that follows from an employer's illegal conduct. Furthermore, the possibility that striking employees might attain the status of unfair labor practice strikers under *Drug Package* may deter an employer from embarking on a course of illegal conduct designed to destroy a

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[21] Once the election is held and the recognitional dispute resolved, no reason exists for the recognitional strike to continue. Moreover, §8(b)(7)(B) of the Act prohibits recognitional picketing "where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted." 29 U.S.C. §158(b)(7)(B) (1976).

If the union wins the election, the employees may, of course, strike in support of economic demands in collective bargaining. This is not the same, however, as a strike in response to employer misconduct. Also, the costs suffered by employees pursuant to a strike to enforce bargaining demands are costs that are plainly anticipated by the scheme of collective bargaining imposed by the Act.

union's majority. *See Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35, 50 (D.C. Cir. 1980) (deterrence is a legitimate remedial purpose of bargaining orders). Thus, the Board's characterization of these striking employees as unfair labor practice strikers "bear[s] appropriate relation to the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953).

Finally, the Board's *Drug Package* doctrine is appropriately remedial and not improperly punitive.[22] If an employer engages in serious and pervasive unfair labor practices that prevent a fair election, the employer may extend a lawful recognitional strike beyond the date on which, by operation of the lawful election process, it would have terminated. Thus, the Board may properly conclude that the employees would not be "made whole" for their employer's unfair labor practices if they were not entitled to prompt reinstatement after their unconditional offers to return to work. *See International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 604 F.2d 689, 697 (D.C. Cir. 1979). Similarly, the Board may properly conclude that the employer has forfeited its right to hire permanent replacements for its striking employees when their absence from work stems from the employer's unlawful impairment of the electoral process. *See, e.g., M.H. Ritzwoller Co.* v. *NLRB*, 114 F.2d 432, 437 (7th Cir. 1940). The *Drug Package* doctrine therefore lies within the broad remedial discretion that Congress gave to the Board, 29 U.S.C. § 160(c) (1976), and which the courts have recognized,

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[22] We express no opinion about application of the *Drug Package* doctrine to cases in which the recognitional strike antedates the employer's refusal to bargain or in which the employer's unfair labor practices begin long after the employees' unconditional offers to return to work. *See* note 18 *supra*. We assume that the Board will apply *Drug Package* in different cases judiciously, keeping in mind that its orders may not be punitive. *E.g., Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 11-12 (1940).

*e.g., Virginia Electric & Power Co.* v. *NLRB,* 319 U.S. 533, 540 (1943); *United Steelworkers* v. *NLRB,* 646 F.2d 616, 629-30 (D.C. Cir. 1981), and we affirm it.[23]

As we noted earlier, the facts of this case are indistinguishable from those of *Drug Package.* The Union demanded recognition based on a valid card majority. The Company refused and embarked on an unlawful course of conduct designed to destroy the Union's majority. The Union then unsuccessfully struck for recognition. After considering the employer's conduct, the Board concluded that a retroactive bargaining order should issue. We therefore uphold the Board's decision, based on *Drug Package,* to view the striking employees as unfair labor practice strikers, whom the Company therefore had an obligation to reinstate upon their unconditional offers to return to work on November 14, 1977.

## IV. Conclusion

For the reasons set forth above, we affirm the Board's findings of fact and conclusions of law and deny the petitions for review. We grant enforcement of the Board's Order in full.

*So ordered.*

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[23] The Board summarized its *Drug Package* doctrine as: "[W]hen employees strike for recognition which should have been granted at the time they went on strike and where the employer engaged in contemporaneous widespread illegal conduct designed to frustrate the statutory scheme, and bargaining in particular, the striking employees are unfair labor practice strikers." *Drug Package Co.,* 228 N.L.R.B. at 112 (footnote omitted), *quoted in John Cuneo, Inc.,* 253 N.L.R.B. at 1026. The Board's phrase "recognition which should have been granted at the time [the employees] went on strike" might be subject to misinterpretation, but we do not believe it represents a flaw in the Board's enunciation and application of the *Drug Package* doctrine. When read in context, it is clear that the Board fully recognizes the holding of *Linden Lumber* that an employer who commits no unfair labor practices has no obligation to recognize a union without an election to demonstrate the union's majority status. Rather than suggesting some duty on the part of an employer, acting within its lawful rights, to recognize a union without a representation election, we read this language as applying to an employer who has committed serious unfair labor practices and thus forfeited its right to a Board election.

## APPENDIX B

FJP

253 NLRB No. 110 D—7211
Chattanooga, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

John Cuneo, Inc.

and Cases 10—CA—13130,
10—CA—13280,
Road Sprinkler Fitters 10—CA—13357, and
Local No. 669 10—CA—13417

### DECISION AND ORDER

On March 24, 1980, Administrative Law Judge James T. Youngblood issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The Charging Party filed cross-exceptions and a brief in support thereof, and Respondent filed a brief in opposition to the Charging Party's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to af-

firm the rulings, findings,[1] and conclusions of the Administrative Law Judge as modified herein.

We agree with the Administrative Law Judge's finding that Respondent committed various violations of Section 8(a)(3) and (1) of the Act, and that Respondent's unfair labor practices warrant the issuance of a bargaining order. However, we do not rely on the Administrative Law Judge's rationale for issuing the bargaining order, and for finding that the employees engaged in an unfair labor practice strike, as explained below.

The relevant facts, more fully set forth in the Administrative Law Judge's Decision, are summarized as follows.

On September 15, 1977,[2] the Union held an organizational meeting at which a majority of the 14 unit employees signed authorization cards. The next day union representatives met with Respondent's president, Bob Splawn, and informed him that a majority of his employees had selected the Union to represent them for the purposes of collective bargaining. Splawn refused to discuss the matter, suggesting that the Union contact

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[1] Both Respondent and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We disavow reliance on the Administrative Law Judge's rationale in sec. III, par. 11, of his Decision, stating that if Gerald Hall were a supervisor it would not have been necessary for Respondent to interrogate him or elicit a signed statement that he was a supervisor.

the Board. Soon thereafter, having consulted his attorney, Splawn called employee Gerald Hall into his office and questioned him about his knowledge of the Union's organizational efforts and about his own union sentiments. Later that day, and again on September 20, Hall was once more interrogated concerning what he knew about the Union, and was asked to sign a statement admitting he was a supervisor. On September 20, Hall was threatened with discharge if he did not sign the statement. The Administrative Law Judge found that the questioning of Hall on these three occasions and the threat of discharge constituted violations of Section 8(a)(1) of the Act.

After his meeting with Hall on September 16, Splawn summoned Supervisor Ray Collins and asked him who had signed the authorization cards. When Collins responded that he did not know, he was told to find out. Shortly thereafter, Collins told one of the fabrication employees[3] that Splawn had asked him which of them had signed the authorization cards. As found by the Administrative Law Judge, Respondent thereby interrogated an employee and created an impression of surveillance of employees' union activities in violation of Section 8(a)(1) of the Act.

On September 20, the unit employees conducted a meeting at which they agreed that, if Respondent refused to recognize the Union the following day, they would strike. The next day, the union representatives again demanded that Splawn recognize the Union. Shortly after Splawn refused, 8 of the 10 bargaining unit employees working on the day shift walked out of the plant

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[2] All dates hereafter refer to 1977, unless otherwise indicated.

[3] In sec. III of his Decision, par. 5, the Administrative Law Judge inadvertently stated that Supervisor Collins told fabrication employees with the bargaining unit that Respondent's president, Splawn, had asked him to find out which of them had signed authorization cards. The record reflects that Collins spoke to only one fabrication employee.

and began picketing Respondent's premises. Later that evening the strikers were joined by four other employees, three of whom worked on the night shift, and Supervisor Ray Collins.

On September 23, while the employees were peacefully picketing, Respondent's attorney took photographs of their activity at the Cuneo premises. Respondent's representative, Buddy Noll, did the same at a secondary location, where one employee was picketing. The Administrative Law Judge properly rejected Respondent's contention that it was taking the photographs solely for the purpose of filing 8(b)(7) and 8(b)(4) charges and to obtain evidence regarding possible misconduct by one employee.[4] Accordingly, he found that Respondent's photographing the employees violated Section 8(a)(1) of the Act.

In February 1978, President Splawn told returning strikers Bowes and Worley that they should not talk about the Union on the job. Respondent's promulgation of this rule prohibiting its employees from engaging in discussion regarding the Union at any time was properly found to be a violation of Section 8(a)(1) of the Act. In addition, these two employees were warned by Splawn at the time of their return that they should not be late again, and that they would be discharged if they were late in the future. The Administrative Law Judge properly found that this progressive disciplinary system relating to employees' tardiness was instituted to discourage membership in the Union in violation of Section 8(a)(3) and (1) of the Act. He also concluded that the oral warnings to Bowes and Worley were given for the same reason, therefore violating Section 8(a)(3) and (1).

Meanwhile, on November 14, seven employees made unconditional offers to return to work. They were Donald Gregg,

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[4] There is no indication that Respondent used the photographs in any 8(b)(7) or 8(b)(4) proceeding.

Jerry Brite, Michael Green, Allen Bowes, David Worley, Stan Ray, and Melvin Talkington. Green had previously been reinstated on October 24, but, as found by the Administrative Law Judge, he was lawfully dismissed on October 26. Accordingly, Green was not eligible for reinstatement after November 14. Of the remaining six employees, none was promptly returned to work, and, at the time of the hearing, Brite and Talkington still had not received offers of reinstatement. Having concluded that they had participated in an unfair labor practice strike, the Administrative Law Judge properly found that Respondent violated Section 8(a)(3) and (1) by failing immediately to reinstate the six, even if it meant discharging employees who had been hired as replacements.

As stated at the outset, we disagree with the Administrative Law Judge's reasoning in issuing a remedial bargaining order and in finding that the strike which began on September 21 was an unfair labor practice strike. However, we agree with his ultimate conclusion on both counts.

The Administrative Law Judge stated in his Decision that the employees were aware of the unfair labor practices committed prior to the strike,[3] and that it was this knowledge, plus Respondent's refusal to bargain with the Union, that caused the employees to strike on September 21. Board law holds that an unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather, there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices. *Typoservice Corporation,* 203 NLRB 1180 (1973). Even assuming that the employees were aware of Respondent's illegal conduct, as found above, there is nothing in the record which shows

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[3] As noted, Respondent's prestrike 8(a)(1) violations included three separate interrogations, a threat of discharge, and the creation of an impression of surveillance through a conversation with an employee.

that they were striking at any time for any purpose other than their stated one: to achieve recognition of the Union as their bargaining representative. Therefore, whether the strike was an unfair labor practice strike depends on whether it can be so classified under the Board's decision in *Drug Package Company, Inc.*, 228 NLRB 108, 112 (1977), enfd. as modified 570 F.2d 1340 (8th Cir. 1978); decision on remand 241 NLRB No. 44 (1979). This, in turn, depends on whether Respondent committed unfair labor practices of sufficient seriousness to justify imposition of a remedial bargaining order. In *Drug Package*, the Board stated that, "when employees strike for recognition which should have been granted at the time they went on strike and where the employer engaged in contemporaneous widespread illegal conduct designed to frustrate the statutory scheme, and bargaining in particular, the striking employees are unfair labor practice strikers."

We first assume for the sake of argument that the strike which began on September 21 was an economic strike. Upon their unconditional offer to return to work, economic strikers are entitled to immediate reinstatement to their former positions, or, if those positions have been filled by permanent replacements, to full reinstatement upon the departure of their replacements, unless the employer can show legitimate and substantial business reasons for not reinstating the employees.[6] Respondent contends that the strikers had been permanently replaced and that they were offered positions by seniority as vacancies arose. In support of its assertion, Respondent produced a chart, purportedly reflecting the names of strikers and their replacements, when vacancies occurred after November 14, and when offers of reinstatement were made. However, by Respondent's own admission, the chart is incomplete in that, among other things, it

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[6] *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (8th Cir. 1969).

fails to indicate the names of all the replacements and the total number of bargaining unit employees over that period of time.[7]

As noted earlier, the evidence is uncontroverted that, at the time of hearing, Brite and Talkington had yet to be offered reinstatement. It is also clear that Bowes and Worley were not offered their jobs back until February 1, 1978, that Gregg was not offered reemployment until February 20, 1978, and Ray not until June 1978. The chart also reflects that, although the first striking employees were not offered their jobs back until February 1, vacancies occurred in the bargaining unit on November 30, when two replacement employees quit. Respondent's own evidence shows that a new employee was hired on November 25, and another on January 17, 1978. Clearly, Respondent did not promptly offer reinstatement to striking employees as soon as vacancies occurred after the November 14 request to return to work. Therefore, Respondent's conduct was violative of Section 8(a)(3) and (1) of the Act.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 614 (1969), the Supreme Court decided that a bargaining order is proper in cases where the employer's unfair labor practices have the tendency to undermine the union's majority strength and impede the election process, and where "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected [thereby]." Having considered all relevant facts concerning Respondent's unfair labor practices, we conclude that they were sufficiently serious and pervasive in character to preclude the holding of a fair election and to warrant the issuance of a bargaining order.

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[7] Respondent conceded that the unit employees may have doubled in number since the strike.

As the events described demonstrate, 6 of the 14 employees in the original unit were discriminated against for having exercised their Section 7 right to strike. Brite and Talkington were, in essence, discharged since they were never offered their jobs back. Bowes, Worley, Gregg, and Ray were not offered reemployment until months after Respondent had began filling vacancies that occurred following their request to return to work. In view of the small size of the unit and the severity of the discriminatory practices, it is not unreasonable to infer that other employees were aware of Respondent's unlawful conduct against their coworkers. Furthermore, almost from the moment it learned of its employees' support for the Union, Respondent embarked on an unlawful course of conduct designed to stifle further union activity. One employee, Gerald Hall, was the subject of three separate interrogations and a threat of discharge. Supervisor Collins violated the Act by creating the impression of surveillance of union activities in his talk with one employee, and Respondent further violated the Act by photographing employees as they peacefully picketed its premises. In addition, when employees Bowes and Worley returned to work in February 1978, they were told by Respondent's president that they should not talk about the Union on the job. Respondent's promulgation of this rule prohibiting discussion of the Union at any time was violative of Section 8(a)(1) of the Act. The two employees were also warned that they should not be late again and that they would be discharged if they were late in the future. We have found that this progressive disciplinary system was instituted to discourage union membership in violation of Section 8(a)(3) and (1) of the Act. The oral warnings were found to have the same purpose, and to have violated the same section of the Act.

Accordingly, we find that Respondent unlawfully refused to bargain with the Union on September 16, the date on which the Union demanded recognition and on which Respondent embarked on its course of illegal activity. We will, therefore, order Respondent to bargain retroactively from that date.

Having concluded that Respondent violated Section 8(a)(5) and (1) of the Act by withholding recognition from the Union on September 16, the strike of September 21 was an unfair labor practice strike under the rationale of *Drug Package Company, Inc., supra.* Accordingly, upon the unconditional offer to return to work on November 14, Respondent had an obligation to reinstate the employees as unfair labor practice strikers. Its failure to do so constitutes a violation of Section 8(a)(3) and (1) of the Act.

**Conclusions of Law**

1. John Cuneo, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Road Sprinkler Fitters Local No. 669 is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees engaged in the fabrication of fire protection systems at Respondent's sprinkler fabrication shop in Chattanooga, Tennessee, excluding all other employees, office clerical employees, truck drivers, professional employees, field installation personnel, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By interrogating employee Gerald Hall about his knowledge of the Union and his own union desires and by threatening him with discharge if he did not admit to being a supervisor; by creating an impression of surveillance by telling an employee that Respondent had directed a supervisor to find which employees were involved with the Union; by engaging in surveillance of its employees' activities on behalf of the Union by taking pictures of its employees engaged in peaceful picketing; and by promulgating a rule prohibiting its employees from engaging in discussions regarding the Union at any time on Respondent's plant premises, Respondent has violated Section 8(a)(1) of the Act.

5. By promulgating a progressive disciplinary system relating to employees' tardiness, instituted to discourage membership in the Union, and by orally warning and threatening to discharge employees Allen Bowes and David Worley for breach of this new rule, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. By refusing immediately to reinstate unfair labor practices strikers Donald Gregg, Jerry Brite, Allen Bowes, David Worley, Stan Ray, and Melvin Talkington, on November 14, upon their unconditional offer to return to work on November 14, discharging if necessary any persons hired permanently to replace them, Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By refusing on or about September 16, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

**The Remedy**

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

In particular, having found that Respondent has violated Section 8(a)(3) and (1) of the Act by failing to offer reinstatement to Donald Gregg, Jerry Brite, Allen Bowes, David Worley, Stan Ray, and Melvin Talkington upon their unconditional offer to return to work on November 14, 1977, we shall order Respondent to offer them immediate and full reinstatement, unless

reinstatement has already been offered, to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any persons hired permanently to replace them, and to make them whole for any loss of earnings or other benefits they may have suffered as a result of the discrimination practiced against them, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

Having further found that Respondent violated Section 8(a)(5) of the Act by refusing to bargain collectively with the Union, we shall order that it recognize and, upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit and, if an understanding is reached, embody such understanding in a written, signed agreement.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, John Cuneo, Inc., Chattanooga, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Road Sprinkler Fitters Local No. 669 as the exclusive bargaining representatives of its employees in the following appropriate unit:

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[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Member Jenkins would award interest on the backpay in accordance with the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

All employees engaged in the fabrication of fire protection systems at the Respondent's sprinkler fabrication shop in Chattanooga, Tennessee, excluding all other employees, office clerical employees, truck drivers, professional employees, field installation personnel, guards and supervisors as defined in the Act.

(b) Interrogating its employees concerning their union membership and desires and the union membership and desires of their fellow employees.

(c) Threatening to discharge its employees because of their activities on behalf of the Union.

(d) Creating an impression of surveillance of its employees' union activities by telling employees that Respondent has directed supervisors to find which employees are involved with the Union.

(e) Engaging in surveillance of its employees' activities on behalf of the Union, by taking pictures of its employees engaged in peaceful picketing of Respondent.

(f) Promulgating new rules, contrary to its past practice, relating to employee tardiness in order to discouarge union activity.

(g) Issuing verbal warnings to employees for infractions of Respondent's new rule on tardiness, which was formulated and maintained because of the employees' activities on behalf of, and in support of, the Union and threatening employees with discharge for further breach of this rule.

(h) Promulgating rules prohibiting its employees from engaging in discussions regarding the Union at any time on Respondent's plant premises.

(i) Failing to recall and reinstate unfair labor practice strikers following an unconditional offer to return to work to their same or substantially equivalent positions, discharging if necessary any persons hired permanently to replace them.

(j) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer Donald Gregg, Jerry Brite, Allen Bowes, David Worley, Stan Ray, and Melvin Talkington immediate and full reinstatement, unless reinstatement has already been offered, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any persons hired permanently to replace them.

(c) Make Donald Gregg, Jerry Brite, Allen Bowes, David Worley, Stan Ray, and Melvin Talkington whole for any loss of earnings they may have suffered due to the discrimination practiced against them, as set forth in the section of this Decision entitled "The Remedy."

(d) Immediately rescind its newly adopted rule prohibiting its employees from engaging in discussions regarding the Union at any time on Respondent's plant premises.

(e) Immediately rescind its progressive disciplinary system relating to employee tardiness because of their activities on behalf of the Union.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Chattanooga, Tennessee, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by an authorized representative of John Cuneo, Inc., shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C. January 7, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

WE WILL NOT promulgate rules prohibiting our employees from engaging in discussions regarding the Union at any time on our plant premises.

WE WILL NOT fail to recall and reinstate unfair labor practice strikers following an unconditional offer to return to their same or substantially equivalent positions, discharging, if necessary, any persons hired permanently to replace them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL recognize and, upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL offer Donald Gregg, Jerry Brite, Allen Bowes, David Worley, Stan Ray, and Melvin Talkington immediate and full reinstatement, unless reinstatement has already been offered, to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any persons hired permanently to replace them.

WE WILL make Donald Gregg, Jerry Brite, Allen Bowes, David Worley, Stan Ray, and Melvin Talkington whole for any loss of earnings they may have suffered due to the discrimination practiced against them by paying each of them a sum equal to what he would have earned, less any net interim earnings, plus interest.

WE WILL immediately rescind our newly adopted rule prohibiting our employees from engaging in discussions regarding the Union at any time on our plant premises.

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## Appendix

### Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Road Sprinkler Fitters Local No. 669 as the exclusive bargaining representative of our employees in the bargaining unit described below:

> All employees engaged in the fabrication of fire protection systems at our sprinkler fabrication shop in Chattanooga, Tennessee, excluding all other employees, office clerical employees, truck drivers, professional employees, field installation personnel, guards and supervisors as defined in the Act.

WE WILL NOT interrogate our employees concerning their union membership and desires, and the union membership and desires of their fellow employees.

WE WILL NOT threaten to discharge our employees because of their activities on behalf of the Union.

WE WILL NOT create an impression of surveillance of our employees' union activities by telling our employees that we have directed our supervisors to find which employees are involved with the Union.

WE WILL NOT engage in surveillance of our employees' activities on behalf of the Union by taking pictures of our employees engaged in peaceful picketing of our plant premises.

WE WILL NOT promulgate new rules, contrary to our past practice, relating to employee tardiness in order to discourage union activity.

WE WILL NOT issue verbal warnings to our employees for infractions of our new rule on tardiness, which was formulated and maintained because of our employees' activities on behalf of and in support of the Union, and WE WILL NOT threaten our employees with discharge for breach of this rule.

WE WILL immediately rescind our progressive disciplinary system relating to employees' tardiness which was promulgated because of our employees' activities on behalf of the Union.

JOHN CUNEO, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, Marietta Tower, Suite 2400, 101 Marietta Street, N.W., Atlanta, Georgia, 30303, Telephone 404-221-2886.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

John Cuneo, Inc.

and Case No. 10-CA-13130

Road Sprinkler Fitters Local
No. 669

John Cuneo, Inc.

and Cases 10-CA-13280
10-CA-13357
10-CA-13417

Road Sprinkler Fitters Local
Union No. 669, U.A.

Robert H. Liddle, Jr., Esq., of Atlanta, GA., for the General Counsel.
William W. Osborne, Jr., Esq., of Washington, DC, for the Charging Party.
Ronald G. Ingham, Esq., of Chattanooga, TN., for the Respondent.

## DECISION

### Statement of the Case

JAMES T. YOUNGBLOOD, Administrative Law Judge: The several complaints which issued in this case allege that John Cuneo, Inc., (herein the Respondent or Cuneo) engaged in con-

duct violative of Sections 8(a)(1), (3) and (5) of the Act. In its several answers the Respondent denied the commission of any unfair labor practices. A hearing in this matter was held in Chattanooga, Tennessee, on September 12, 13, and 14, 1978, and November 14, 15, and 16, 1978.

Upon the entire record and from any observations of the witnesses and their demeanor, and after due consideration of the briefs filed herein, I hereby make the following:

## Findings of Fact[1]

### I. The Business of the Company

Respondent is a Tennessee corporation with an office and place of business located at Chattanooga, Tennessee, where it is engaged in the design, fabrication, and sale of fire protection sprinkler piping systems. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

### II. The Labor Organization Involved

The Respondent admits, and I find, that Road Sprinkler Fitters Local No. 669 (herein the Union), is a labor organization within the meaning of Section 2(5) of the Act.[2]

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[1] The findings of fact herein are based on record evidence and testimony, sometimes disputed. Though the findings may not contain or refer to all the evidence, all has been considered. Any testimony contrary to the findings has not been credited. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses.

[2] Road Sprinkler Fitters Local No. 669, U.A. as set forth in the caption is the same Union.

### III. The Alleged Unfair Labor Practice

On September 15, 1977,[3] the Union held an organizational meeting at the Chattanooga, Tennessee, Ramada Inn. In addition to Union representatives Billy C. Brown, Tommy Prewett, and Roy Pantell, eight of Respondent's day shift employees attended this meeting.[4] Union authorization cards were distributed among the 8 employees. Each employee read the card and affixed his signature in the presence of the Union representatives and the other employees and individually returned the cards to Union representative, Brown.[5]

Later that day Melvin Talkington, an employee within the bargaining unit, obtained the signatures of three other employees to authorization cards. These three employees worked on the night shift and did not attend the Union meeting at the

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[3] Unless otherwise specified all dates refer to 1977.

[4] The complaint alleges and the Respondent admits that "all employees engaged in the fabrication of fire protection systems at the Respondent's sprinkler fabrication shop in Chattanooga, Tennessee, excluding all other employees, office clerical employees, truck drivers, professional employees, field installation personnel, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act." The unit is composed of fabrication and welder employees. The parties agree that on September 15, the unit consisted of 14 employees, working on both the day and night shifts.

[5] Employee Gerald Hall, an alleged supervisor, was also present at this meeting and signed an authorization card along with Donald Gregg, Stanton Ray, Mike Green, Melvin Talkington, Ronald Hall, Christopher Bowes, and David Worley (see G.C. Exhibits 3 through 10). The authorization card authorizes the Union or its representatives to represent the employees in collective-bargaining negotiations on all matters pertaining to rates of pay, hours or other condition of employment.

Ramada Inn.[6] Talkington then returned to the motel and delivered the cards to representative Brown.

The following day, September 16, Union representatives Prewett and Pantell visited the Cuneo Fabrication Shop in Chattanooga,[7] and informed Respondent's president Bob Splawn that a majority of Splawn's employees had selected the Union to represent them for the purpose of collective bargaining, and requested Respondent's president Splawn to recognize and bargain with the Union and to immediately commence negotiations. Splawn refused this request and informed the Union representatives that they should submit their information to the National Labor Relations Board.

Immediately after Splawn advised Prewett and Pantell that they should submit their information to the Board, Splawn contacted his attorney Al Vadnais, and appraised him of the Union's demands. Splawn then called Gerald Hall into his office and questioned Hall concerning his knowledge of the Union's organizational efforts and also concerning Hall's union desires.[8] Hall declined to answer any of Splawn's questions concerning the Union merely stating that he did not want to discuss it. Later on in the day Hall was again summoned into president Splawn's office. This time attorney Vadnais was present and he informed Hall that he had a right to leave the meeting at any time. Hall was again asked what he knew about the Union and he refused to comment. During this meeting attorney Vadnais asked Hall a series of questions purportedly directed to determining his possible status as a supervisor under the Act. During the meeting Hall was asked to sign a statement to the effect that

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[6] These three employees were George Hall, Jerry Brite and Robert Green. (See G.C. Exhibits 14, 15 and 16).

[7] On the same day Union representative Brown traveled to Atlanta and filed the representation petition in Case 10-RC-11230.

he was a supervisor, Hall refused to do this and he was asked to think the matter over during the weekend.

Following the second meeting with Gerald Hall on September 16, Ray Collins, an admitted supervisor, was called into Splawn's office. Collins was informed by Splawn that he had a visit from the Union and Splawn asked Collins if he knew who signed the authorization cards. Collins replied that he did not know. Splawn then asked Collins to find out who signed the Union cards. After the meeting ended Collins told fabrication employees within the bargaining unit that Splawn had asked him to find out which of them had signed the authorization cards.

On Tuesday, September 20, 1977, Hall was again called into Splawn's office for a third meeting. Splawn again questioned Hall concerning the Union activities of the fabrication employees. During this meeting Splawn again attempted to persuade Hall to sign a statement indicating that he was a supervisor of the fabrication employees. Hall refused to sign the statement and Splawn informed him that if he did not sign he would be terminated. Hall told Splawn to go ahead and fire him. At this point Hall left Splawn's office and went to the bathroom where he was confronted by Charles Izell, a supervisor. Izell told him that Splawn did not really want to terminate him. Hall then returned to Splawn's office and the meeting resumed. During the meeting Splawn informed Hall that according to Union contracts in other shops some of the Cuneo shop employees would not benefit from Union representation. With this in mind Hall agreed that he would sign a statement that he was a supervisor in return for Splawn's promise to speak to the other employees and prove to them that being represented by the Union is not in their best interest. At this point no such statement had been drafted. However a statement was later drafted and the next day Hall signed the statement. Hall credibly testified that this statement merely reflected that he was a supervisor.

Later another statement was presented to Hall by Charles Izell for his signature. Izell told Hall at the time that some words had been added reflecting that Hall might have influenced employees to sign the Union authorization cards. Hall accepted Izell's word and never read the second statement before signing it. The second statement signed by Hall clearly states that Hall had definitely encouraged employees to sign authorization cards. Hall, however, testified that the first statement he signed only stated that he was a supervisor and there was nothing in it about his encouraging employees to sign authorization cards. The first statement Hall signed was not put in evidence by the Respondent because it could not be found. The second statement definitely states that Hall did in fact encourage employees to sign authorization cards. Hall denied encouraging any employee to sign an authorization card and the record here contains no credible evidence to establish that Hall did in fact encourage any employee to sign an authorization card. Whether or not Hall encouraged employees to sign authorization cards is only material if Hall is in fact a supervisor.

**The Supervisory Status of Gerald Hall**

At the time of the events herein Gerald Hall was the most senior employee in the Respondent's fabrication shop having seven years experience. Hall was also the most knowledgeable employee and his hourly rate was higher than those of his fellow employees. Prior to May, Jerry Spurgeon had been the first shift foreman. Spurgeon had the authority to hire, fire, discipline employees. He had been so informed personally by President Splawn. Spurgeon was salaried and received 2-week's paid vacation. He attended the weekly meetings together with other of Respondent's management representatives. Gerald Hall worked on the first shift under Spurgeon for five years prior to May. Hall did receive a 1-week paid vacation. Around May 24, Spurgeon was terminated by Splawn. On the same day that Spurgeon was terminated, Splawn called a meeting of the shop employees and announced that thereafter, Charlie Izell

would be in charge of the shop and that the employees would report directly to him. Charles Izell, Respondent's purchasing agent and an admitted supervisor, had previously been a foreman.

According to Hall he had no authority to hire or fire or discipline employees or to assign employees to particular tasks. He testified that Charlie Izell would give him lists which contained the jobs to be performed in a given day. That he would separate the lists and hand them out to each of the different department employees who knew their jobs and they performed them. Hall testified that for the most part he merely performed the work like all other employees. As an experienced employee Hall would show new employees how to perform their work if they were having difficult problems. However this was no different from other experienced employees because those who knew showed those that did not know. As Hall was the most experienced employee in the plant he obviously was better trained than the other employees. Hall was hourly paid unlike Spurgeon and Izell and Hall did not ever attend the weekly management meetings. Hall did not receive a pay increase when Spurgeon was discharged and although he did receive a 1-week paid vacation he had been granted this several years before Spurgeon left the Respondent's employ. Splawn testified that Spurgeon did have the authority to hire and fire and he had been informed that he was a supervisor. Splawn also testified that when Spurgeon left he never told Hall that he had the authority to hire and fire. Splawn attempts to explain this by stating that Hall was already a supervisor and he did not need to inform him of his authority.

Other than the testimony of Respondent's management witnesses that Hall had the authority to hire and fire and to discipline employees there is no documentary evidence to support the fact that Hall was promoted to the position of shop foreman. It is my conclusion that Gerald Hall was nothing more than a loyal, knowledgeable employee who was skilled and ex-

perienced and often demonstrated job procedures to the inexperienced employees. He also served as a carrier of instructions for management. Based on the record as a whole and on the credited testimony of Gerald Hall it is my conclusion that Hall is not a supervisor within the meaning of Section 2(11) of the Act.

Moreover, it is my conclusion that if Hall were a supervisor in fact it would not have been necessary for Splawn and attorney Vadnais to interrogate him concerning his supervisory duties. Nor would it have been necessary for them to elicit a signed confession from him that he was a supervisor.

Furthermore, even assuming that Hall was a supervisor at the time of the events involved herein, other than the statement given by Hall there is no credible evidence that Hall in any way attempted or in fact influenced any employee to sign an authorization card. Because of the threats and promises made to Hall to get him to sign the statement I do not rely on that statement as effecting Hall's credibility in any regard.

Having found that Gerald Hall has no supervisory status it is my conclusion that the Respondent's questioning of Hall by President Splawn and Attorney Vadnais concerning his Union activities and activities of other employees was clearly violative of Section 8(a)(1) of the Act. Additionally I must conclude that President Splawn's threat to Hall to discharge him because of his Union affiliation or his failure to discuss the Union with Splawn was also violative of Section 8(a)(1) of the Act. Also on September 18, 1977, following Splawn's questioning of supervisor Ray Collins and after he had ordered Collins to attempt to secure information concerning the Union's organizational campaign Collins questioned employee Ted Hall concerning his Union involvement and told Hall that Splawn had ordered him to find out what he could about the Union. By these acts the Respondent engaged in further acts of interrogation and also created an impression of surveillance of its employee's Union activities in violation of Section 8(a)(1) of the Act.

**The Strike**

On September 20, Respondent's employees conducted a meeting and agreed that on the following day if Respondent refused to recognize and bargain with the Union the employees would walk out on strike. On the morning of September 21, the Union representatives again visited the Cuneo facility and repeated their demands to Splawn that he recognize and bargain with the Union. Once more they were refused and Splawn referred the Union representatives to his attorney. Shortly thereafter eight of the ten bargaining unit employees working on the day shift walked out of the plant and began picketing the Respondent's premises. The picket signs stated that the Respondent had refused to bargain with the Union. Shortly after the strike commenced President Splawn approached the picket line and *counted* the eight employees on the picket line and announced that if they did not abandon the strike and return to work in 15 minutes they would be permanently replaced. The employees on the picket line at that time ignored Splawn's admonition and the strike continued.

Later that evening three of the night shift fabrication employees joined the strike and Gerald Hall *and supervisor Ray Collins* quit work and joined the strike themselves.[9] The following day business agent Brown along with the strikers entered the fabrication shop and presented Respondent's superintendent E. C. Noll with a petition which 10 out of 14 unit employees executed.[10] This petition indicated that the employees had selected the Union as their bargaining representative and indicated that they were willing to return to work. Again recognition was denied and none of the employees were returned to work.

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[9] Gerald Hall quit Respondent's employment and does not seek to be reinstated. Because of this I have placed emphasis on his credibility.

[10] G. C. Exhibit 12.

On September 23, while the employees were peacefully picketing the Cuneo premises Attorney Vadnais took photographs of their activities. Also Respondent's representative Buddy Noll took photographs of Respondent's employee Melvin Talkington while he was picketing the Quaker Oats Company, a secondary location, on October 14.[11] Additionally on September 22, the second day of the strike Splawn explained that he received a complaint that someone had crossed the picket line at an excessive rate of speed and he secured the services of pinkerton guard William Hilliard to take photographs at the picket line. These photographs were subsequently used to identify employee Mike Green who was terminated for alleged misconduct and for leaving work without an explanation.

In all instances the picketing employees were engaged in protected concerted activities. The Respondent states that it viewed the picket line as being recognitional picketing and it was seeking ways to reduce the usual 30 days of picketing under Section 8(b)(7)(C) of the Act. And in this regard attorney Vadnais took a photograph of a truck driver being impeded in his efforts to enter Cuneo's facility. (See Respondent's Exhibit 32). Additionally Respondent alleges that the picture taken by superintendent E. C. Noll was to secure pictures of the Union picketing jobs performed by Cuneo at a neutral site in order to file an 8(b)(4)(B) charge. I understand that 8(b)(7)(C) and 8(b)(4)(B) were in fact filed.

I do not accept the Respondent's explanation that it was taking these photographs solely for the purpose of filing 8(b)(7) and 8(b)(4) charges and to obtain evidence on one employee, Michael Green who was alleged to have engaged in picket line misconduct.

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[11] Respondent had an installation crew working at this site.

Under well established Board law an employer engaged in surveillance of its employee's activities when he takes photographs of their picket line activities. Accordingly, I find that Respondent engaged in this activity for the purpose of intimidating its employees in their organizational effort and I conclude that such conduct clearly violates Section 8(a)(1) of the Act.

On September 22, two replacement employees, Odell Lowry and Lee Ralston came to the Cuneo facility, were interviewed by Splawn, hired, and told to report to work the following day. According to the uncontroverted testimony of Lee Ralston as he and Lowry were leaving the Cuneo plant Michael Green, a striking employee told Ralston to get out of the car, that no son of a bitch was going to take his job away from him and that he was going to stomp his ass.[12]

To avoid any trouble Lowry and Ralston drove off the Cuneo premises, but they were followed by Green and another individual for approximately 4 miles. Ralston testified that when he arrived at his destination he called Cuneo President Splawn and told him what had occurred.

On October 6, Michael Green called Charles Izell, Respondent's supervisor, and inquired about returning to work. He informed Izell that he and Donald Gregg were interested in returning to work. Izell informed Green that there were no positions available, but as soon as a position opened up he would be contacted. When the next position became available Michael Green was contacted by telegram dated October 20, 1977, advising him that there was a position available and that he could return to work subject to the company's right to discipline for any picket line misconduct. Thereafter, it was arranged between Respon-

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[12] Although Ralston did not know Michael Green at that time he did subsequently identify him.

dent and Green that Green would report for work on the second shift on October 24. According to the uncontroverted testimony of Charles Izell, Respondent's supervisor, it was arranged that Michael Green would be able to leave work a couple of hours early to pick up his wife at work. On this day Izell had asked both Ralston and Lowry to see if they could identify Green as the assailant who threatened them and followed them on September 22. Both Ralston and Lowry saw Green in Izell's office that afternoon and identified him as the individual who threatened them.

At approximately 5:45 p.m. of that same day, only 2 hours into the shift, Michael Green punched out and left the shop without advising anyone. The next day Izell was informed by Splawn that Ralston and Lowry had identified Green as the picket who had accosted them on the picket line and who had followed them in his automobile. Splawn had advised Izell to meet with Green before the start of the second shift and confront him with these problems. When Green was confronted with the fact that he had left the plant at 5:45 p.m. the day before without permission or informing anyone, he responded that he had to take his wife to Tri-County Memorial Hospital due to an emergency. After Izell informed Splawn of Green's statement Izell told Green he was suspended pending an investigation of misconduct as a striker, and his asserted reason for clocking out the night before. The record reflects that a careful study of the Tri-County Memorial Hospital records show that no Mrs. Michael Green or indeed any female named Green was admitted on October 24 or any other day in the month of October. On October 26 Green once again met with Izell at which time Izell gave Green a discharge letter setting forth the basis on which Green had been terminated. That letter, (Respondent's Exhibit 25) indicates that Green was discharged because of misconduct on the picket line; because of his unauthorized departure from work on October 24, and his falsification of the reason he gave for his departure on that day.

Michael Green, the alleged 8(a)(3) in the complaint, was not called by the General Counsel to testify. Therefore the testimony of Ralston, Splawn and Izell as to this matter stands uncontradicted on the record. The only evidence in this record which would indicate that Michael Green was discharged for union activity stems from the testimony of Donald Gregg who testified that at some point in October or December Charlie Izell told him that Mike Green was discharged because he come back in the shop just for the Union.[13]

In view of my credibility findings on this point and in view of the uncontroverted testimony of the Respondent's witnesses regarding Mike Green's involvement in picket line misconduct and his unauthorized departure from work and his fabricated reason for leaving work it is my conclusion that the General Counsel has failed to establish that Michael Green was discharged for union activities in violation of Section 8(a)(3). Therefore I

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[13] Gregg testified that Izell had called him and asked him if he wanted to come back to work. Gregg said that following this conversation he went to the plant and talked to Izell and Izell asked him if he wanted to come back to work. He informed Izell that he did. It was during this conversation that Izell allegedly informed Gregg that Mike Green came back into the shop just for the Union. Gregg also testified that Izell asked him if he would inform the Company of the Union's activities. Gregg also testified that Izell asked him if he was still associated with the Union. On direct examination Gregg testified that these conversations occurred after the strike. He was no more explicit than that. On cross-examination Gregg testified that this conversation occurred approximately 1 month after he signed a letter dated November 13, whereby he unconditionally offered to return to work. On re-direct examination Gregg was shown a mailgram dated November 1, 1977, in which he was questioned about his interest in being reinstated and he testified that this conversation and meeting with Charlie Izell was on November 9. I was not impressed with Gregg as a witness nor with his memory. His testimony for the most part appeared to me to be a complete fabrication and inconsistent with the credited testimony of Charles Izell in this area. Therefore I discredit Donald Gregg in this regard.

shall recommend that this portion of the complaint be dismissed. Additionally, as I have discredited Donald Gregg it is also my recommendation that the portions of the complaint dealing with this alleged conversation between Charles Izell and Donald Gregg are dismissed.

On November 14, Thomas W. Hanna, business manager of the Union, forwarded to Robert Splawn, seven unconditional offers to end the strike and return to work. These unconditional offers were signed by employees Donald Gregg, Jerry Brite, Michael Green, Allen Bowes, David Worley, Stan Ray and Melvin Talkington. At the time of the hearing all of the employees who had been on strike and requested reinstatement, with the exception of Jerry Brite and Melvin Talkington, had been offered reinstatement.

None of the employees were promptly permitted to return to work or immediately offered reinstatement. The Respondent offered an exhibit purporting to be a copy of some payroll records in an attempt to show which employees were working during the week ending November 12. The copy of the exhibit which was received in evidence was accepted on the condition that Respondent ultimately produce the original. The originals were never produced and Respondent's Exhibit 26 which was received as evidence is so illegible that it cannot be used as evidence in this proceeding. The Respondent offered no other credible evidence to establish that no jobs were available for these employees on November 14, 1977, or that these employees had been permanently replaced.

Allen Bowes and David Worley returned to work for Cuneo in February, 1978. On their return these employees were told by Bob Splawn that they should not talk about the Union on the job. These employees were also warned that they should not be late again and were threatened with discharge if they were late in the future. The record reflects that prior to the advent of the

Union no such policy towards tardiness was in practice at the Cuneo plant. It is my conclusion that the Respondent's promulgation of this rule prohibiting its employees from engaging in discussion regarding the Union at any time was a clear violation of Section 8(a)(1) of the Act. Also the promulgation of the progressive disciplinary system relating to employee's tardiness was done because of the employee's union activities and concerted activities designed to discourage membership in the Union in violation of Section 8(a)(1) and (3) of the Act. I also conclude that the oral warnings to employees Bowes and Worley were done for the same reason in violation of Section 8(a)(1) and (3) of the Act.

At the hearing the General Counsel amended the complaint by alleging that Respondent by its supervisor and agent, president Bob Splawn, on or about September 4, 1978, in and about the vacinity of its plant, granted its employees benefits and encouraged its employees to refrain from attending and testify in a Board hearing. And that such acts of the Respondent constituted an unfair labor practice within the meaning of Section 8(a)(1). Gerald Hall testified that he had had two conversations with Bob Splawn prior to the hearing. He testified that the first conversation occurred about 3 months prior to the hearing. He testified that the first conversation occurred about 3 months prior to the hearing. He testified that Splawn had contacted him through his cousin and he went to the plant to talk to Splawn. He testified that Splawn asked him if he would be interested in going back to work with the company and he told Splawn no. He testified that the second conversation occurred on Labor Day in September, 1978 around 9 a.m. He received a telephone call from Splawn who asked him if he had received his profit sharing check yet. And when Hall told him that he had received his profit sharing check Splawn asked him if he was going to go to the Board hearing and Hall informed him that he was.

As indicated above, the complaint alleges that Respondent granted its employees benefits and encouraged its employees to refrain from attending and testifying in a Board hearing. The above testimony of Hall was given to support this allegation. It must be remembered that Gerald Hall was the Respondent's most experienced employee. He had quit his job on the day when the employees walked out in mass and struck the Respondent. The Respondent was obviously in need of skilled employees like Gerald Hall. I do not regard an employer's offering a former employee a job as being a grant of benefit or a means of encouraging its employees to refrain from attending and testifying in a Board hearing. Additionally, Respondent was aware that Gerald Hall's supervisory status was in question and that Gerald Hall would probably be a witness at the hearing. I do not regard the mere asking an employee if he intends to attend a Board hearing as a violation of that employee's Section 7 rights. Under the circumstances, it is my conclusion that the General Counsel has failed to sustain his burden with sufficient evidence to establish that the Respondent violated Section 8(a)(1) in this regard. Therefore I shall recommend that this portion of the complaint be dismissed in its entirety.

**Discussion and Conclusions**

In addition to the allegations as set forth above the General Counsel also contends that the strike which began on September 21 was an unfair labor practice strike and thus all the employees who went on strike were unfair labor practice strikers and therefore entitled to reinstatement upon an unconditional offer to return to work. And when Respondent refused on November 14, to reinstate the six employees who had made an unconditional offer to return to work Respondent violated Section 8(a)(3) and (1) of the Act, by discouraging membership in the Union. Additionally, the complaint alleges that the Respondent has refused to bargain with the Union since September 16, notwithstanding the fact that the Union has been at all times

material herein the representative of a majority of the employees in the unit described above. Additionally the General Counsel argues that the Respondent's conduct herein has destroyed the laboratory conditions indispensible to the conducting of a Board election and therefore a bargaining order should issue. The Respondent on the other hand denies that the employees were unfair labor practice strikers but were merely economic strikers and were replaced by the time they made their unconditional offer to return to work on November 14, and that the Respondent is entitled to a Board conducted election.

**The Strike**

There is no question but that a majority of the employees in the appropriate unit at the Respondent's plant, on September 15, selected the Union as their collective-bargaining representative. On September 16, the Union made a demand for recognition and bargaining upon the Respondent, and the Respondent informed the Union to go to the National Labor Relations Board. Almost immediately the Respondent through its President Splawn engaged upon a course of conduct aimed at undermining the employee's majority representative. In this connection Respondent through President Splawn contacted company attorney, Al Vadnais and apprised him of the Union's demand. Splawn then called employee Gerlad Hall into his office and questioned Hall concerning Hall's knowledge of the Union's organizational efforts and also concerning Hall's Union desires. Hall declined to discuss the Union. Later that day attorney Vadnais came to the Respondent's premises and once again Gerald Hall was summoned into President Splawn's office. During this meeting Hall was questioned by Vadnais concerning his supervisory status. Splawn again requested Hall to supply him with information concerning the Union. Again Hall refused to discuss this matter. Following the second meeting with Gerald Hall on September 16, Ray Collins, an admitted supervisor, was called into Splawn's office. Splawn told Collins

about his visit by the Union and inquired whether Collins knew who signed the Local 669 cards to which Collins replied he did not. Splawn then asked Collins to find out who signed the Union cards. After this meeting ended Collins told other fabrication employees that Splawn had asked him to find out which of them had signed the authorization cards, clearly giving an impression of surveillance to the small number of employees in the plant. On Tuesday September 20, Gerald Hall was again called into Splawn's office for a third meeting. He was once again interrogated concerning the Union activities of the fabrication employees, notwithstanding the fact that he had twice indicated clearly that he did not want to discuss the matter. During this meeting Hall was persuaded by Splawn to sign a statement indicating that he was a supervisor. During this meeting Splawn also informed Hall that if he did not sign the statement he would be terminated. Hall replied that Splawn would have to go ahead and fire him. It is clear that by the interrogation of Hall the Respondent violated Section 8(a)(1) of the Act. It is also clear that by requesting Collins to find out which of the employees had signed authorization cards and Collins' repeating this to the fabrication employees clearly gives the impression of surveillance also violative of Section 8(a)(1) of the Act. It is obvious that the employees were well aware of the fact that these violations had occurred in the plant, particularly with a plant with only 14 fabrication employees involved.

On the morning of September 21, the Union again visited the Cuneo plant and repeated its demand that Splawn recognize the Union and bargain. Once more Splawn refused. At this juncture 8 of the 10 bargaining unit employees working on the day shift walked out on the plant and began picketing. They carried signs indicating that Respondent had refused to bargain with the Union. Because of the small number of employees in the plant and the fact that the 8(a)(1) violations occurred during an organization campaign they were pervasive and were all

calculated to come to the attention of virtually all of the employees. And it is my conclusion that the employees were aware of these unfair labor practices prior to the strike which occurred on September 21. Therefore it is my conclusion that the strike which began on September 21, was because of the Respondent's refusal to bargain and its unfair labor practices in violations of Section 8(a)(1) of the Act. It is also my conclusion that being unfair labor practice strikers these employees were entitled to reinstatement upon their unconditional offer to return to work and when they made such an unconditional offer on November 14, the Respondent was obligated at that point to return them to work even if it meant the discharge of replacements. The Respondent's refusal to reinstate these employees at that point was clearly a violation of Section 8(a)(3) designed to discourage membership in the Union and to undermine the Union's majority status.

**The Alleged Refusal to Bargain and a Bargaining Order**

It is well established that an employer need not recognize a Union on the basis of authorization cards, but rather may insist on a Board conducted election. However an employer may not refuse recognition on the basis of authorization cards, only for the purpose of gaining time to unlawfully dissipate a union's majority status. Here when the Respondent learned of its employee's organizational efforts it immediately embarked on a course of conduct clearly designed to discourage its employee's choice of a bargaining representative. It is my conclusion that Respondent clearly forfeited its right to insist upon a Board election when it unilaterally undertook to determine the Union's support among its employees by engaging the 8(a)(1) violations prior to the strike, and when on September 21, it counted the employees on the picket line and learned that an unmistakable majority of its employees had chosen the Union to represent them. Thus at this point the Union's majority status had

definitely been established. Additionally on the morning of September 22, the employer was presented with a petition signed by 10 of the employees indicating that each had chosen the Union to represent them. At the same time the employees verbally informed Respondent's superintendent Noll that they had selected the Union. There could be no question in the Respondent's mind that the Union represented a substantial majority of the fabrication employees. On November 14, when the six employees made an unconditional offer to return to work the Respondent refused to reinstate these unfair labor practice strikers which was clearly an object lesson to the shop employees and showed Respondent's animus and hostility to any effort by them to organize. While some of the employees did return to work this cannot destroy the destructive affect of Respondent's original refusal to reinstate them. Additionally Respondent imposed a strict and absolute no solicitation rule announced to Bowes and Worley upon their return to work as well as instituting a new rule on tardiness and threatening Bowes and Worley with discharge if they had four instances of tardiness. In my view this type of conduct clearly destroys the free atmosphere required for a Board conducted election.

It is my conclusion that the nature and pervasiveness of the Respondent's unfair labor practices as described above have made the holding of a free election impossible and a bargaining order is warranted to best protect the employee's rights.

I find that the employer clearly embarked on a course of unlawful conduct which may reasonably be deemed to have undermined the Union's majority status and to have prevented the holding of a free election as of September 16, when the employer committed its initial violation of Section 8(a)(1) of the Act by interrogating employee Gerald Hall. As the Union's recognition demand was made on that same day, prior to the interrogation of Hall, I conclude that the employer should be required to recognize and bargain upon request with the Union as of September 16.

As I have concluded that the refusal to bargain occurred on September 16, prior to the strike, it is also my conclusion that this unfair labor practice helped precipitate the strike. See *Trading Port Inc.*, 219 NLRB 298.

**The Effects of the Unfair Labor Practices Upon Commerce**

The activities of the Respondent set forth above, occurring in connection with the Respondent's operations, have a close, intimate and substantial relationship to trade, traffic and commerce upon the several states and tend to lead to labor disputes burdening and obstructing commerce as the free flow of commerce.

**The Remedy**

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent committed a violation of Section 8(a)(5) of the Act, by refusing to recognize the Union in an appropriate unit at the Cuneo facility and that a bargaining order was proper and that an election was not required and the employee's sentiments once expressed in cards would be protected by an bargaining order without an election, I shall order that Respondent be required upon request to bargain collectively with the Union concerning Respondent's fabrication employees.

As I have found that the strike which commenced on September 16, was an unfair labor practice strike and that Respondent's refusal to reinstate the unfair labor practice strikers who made an unconditional offer to return to work on November 14, was violative of Section 8(a)(3) of the Act, I shall recommend that Respondent be ordered to offer immediate and full reinstatement, unless reinstatement has already been of-

fered, to his former job or, if his job no longer exist, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and to make whole for any loss of earnings those strikers who on November 14, made an unconditional offer to return to work thereby making themselves available for employment but were denied reinstatement by the Respondent, with interest. *F. W. Woolworth,* 90 NLRB 289; *Florida Steel Corporation,* 231 NLRB 117.

Upon the basis of the foregoing findings of fact, and the entire record I make the following:

**Conclusions of Law**

1. John Cuneo, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Roads Sprinklers Local Union No. 669, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees engaged in the fabrication of fire protection systems at the Respondent's Sprinkler Fabricating Shop in Chattanooga, Tennessee, excluding all other employees, office clerical employees, truck drivers, professional employees, field installation personnel, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 16, Roads Sprinklers Fitters Local Union No. 669, has been, and is now, the exclusive representative of all the employees in the aforesaid bargaining unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By interrogating its employees concerning their Union membership, activities and desires, and the Union membership, activities and desires of other employees; by threatening to

discharge its employees because of their activities on behalf of the Union; by creating an impression of surveillance of its employee's Union activities and by telling employees that Respondent had directed supervisors to find which employees were involved in the Union; by engaging in surveillance of its employee's activities on behalf of the Union by taking pictures of its employees engaged in peaceful picketing of Respondent, and by promulgating a rule prohibiting its employees from engaging in discussions regarding the Union at any time on Respondent's plant premises, the Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

6. By promulgating a progressive discharge system, contrary to its past practices relating to employee tardiness, and by issuing oral warnings and threatening discharge of its employees for breach of this new employee tardiness rule because of their membership in and activities on behalf of the Union and because they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection the Respondent has engaged in unfair labor practices within the meaning of Section 8(a))3) and (1) of the Act.

7. By refusing on November 14, to immediately reinstate Donald Gregg, Jerry Brite, Allen Bowes, David Worley, Stan Ray, and Melvin Talkington, all of whom are unfair labor practice strikers and who made an unconditional offer to return to work, Respondent has engaged in violations of Section 8(a)(1) and (3) of the Act.

8. By refusing to recognize and bargain collectively with the Union in regard to the employees in the unit set forth above in paragraph three, since on or about September 16, 1977, the Respondent has committed unfair labor practices prohibited by Section 8(a)(5) and (1) of the Act.

The above described unfair labor practice affect commerce within the contemplation of Section 2(6) and (7) of the Act.

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[14]

ORDER

The Respondent, John Cuneo, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their Union membership and desires and the Union membership and desires of their fellow employees.

(b) Threatening to discharge its employees because of their activities on behalf of the Union.

(c) Creating an impression of surveillance of its employee's Union activities by telling employees that Respondent has directed supervisors to find which employees were involved in the Union.

(d) Engaging in surveillance of its employee's activities on behalf of the Union, by taking pictures of its employees engaged in peaceful picketing of the Respondent.

(e) Promulgating new rules, contrary to its past practices, relating to employee tardiness.

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[14] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(f) Issuing verbal warnings to employees for infractions of Respondent's new rule on tardiness, which was formulated and maintained because of the employee's activities on behalf of, and support of, the Union and threatening employees with discharge for further breach of this rule.

(g) Promulgating rules prohibiting its employees from engaging in discussions regarding the Union at any time on Respondent's plant premises.

(h) Discouraging membership in the Union or any other labor organization of its employees, by discriminating in regard to hire, tenure, or other terms and conditions of employment.

(i) Failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the above described appropriate unit at the Respondent's Chattanooga, Tennessee, facility.

(j) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, recognize and bargain with the Union as the exclusive representative of the employees in the above described unit at the John Cuneo, Inc., facility in Chattanooga, Tennessee.

(b) Offer immediate and full reinstatement, unless reinstatement has already been offered, to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make whole for any loss of earnings, those strikers who on November 14, 1977, made an unconditional offer to return to work, thereby making themselves available for employment but were denied reinstatement by the Respondent.

(c) Immediately rescind its newly adopted rule prohibiting its employees from engaging in discussions regarding the Union at any time on the Respondent's plant premises.

(d) Immediately rescind its progressive discharge system relating to employee tardiness because of their activities on behalf of the Union.

(e) Post at its Chattanooga, facility copies of the attached notice marked "Appendix."[15] Copies of said notice on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representatives shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 10, in writing, within 20 days of this Order, what steps have been taken to comply herewith.[16]

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[15] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice rending "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[16] Following the close of the hearing the Respondent filed a motion to correct the transcript. Thereafter, the charging party replied to the Respondent's motion to correct the transcript and objected to paragraph 7 of the Respondent's motion to correct the transcript and objected to paragraph 7 of the Respondent's motion, which would change the name "Grady Collins" to read "Gerald Hall". I agree with the charging party that the transcript accurately reflects the statement at the hearing. Therefore the correction in Respondent's motion paragraph 7 is denied. In all other respects there being no objection by any party the motion is granted.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C. March 24, 1980

/s/ James T. Youngblood,
Administrative Law Judge

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## APPENDIX

(SEAL) **NOTICE TO EMPLOYEES**

**Posted By Order Of The**
**National Labor Relations Board**
**An Agency Of The United States**

WE WILL NOT interrogate our employees concerning their Union membership and desires, and the Union membership and desires of their fellow employees.

WE WILL NOT threaten to discharge our employees because of their activities on behalf of the Union.

WE WILL NOT create an impression of surveillance of our employee's Union activities by telling our employees that we have directed our supervisors to find which employees were involved in the Union.

WE WILL NOT engage in surveillance of our employee's activities on behalf of the Union, by taking pictures of our employees engaged in peaceful picketing of our plant premises.

WE WILL NOT promulgate new rules, contrary to our past practices, relating to employee tardiness.

WE WILL NOT issue verbal warnings to our employees for infraction of our new rules on tardiness, which were formulated and maintained because of the employee's activities on behalf of and in support of the Union, and WE WILL NOT threaten our employees with discharge for breach of this rule.

WE WILL NOT promulgate rules prohibiting our employees from engaging in discussions regarding the Union at any time on our plant premises.

WE WILL NOT discourage membership in the Union or any other labor oragnization of our employees, by discriminating in regard to hire, tenure, or other terms and conditions of employment.

WE WILL NOT fail or refuse to recognize and bargain with the Union as the exclusive bargaining representative of our employees in the above-described appropriate unit at our Chattanooga, Tennessee, facility.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL upon request, recognize and bargain with the Union as the exclusive representative of the employees in the above-described unit at our facility in Chattanooga, Tennessee.

WE WILL offer immediate and full reinstatement, unless reinstatement has already been offered, to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make whole for any loss of earnings, all those strikers who on November 14, 1977, made an unconditional offer to return to work, thereby making themselves available for employment but were denied reinstatement.

WE WILL immediately rescind our newly adopted rule prohibiting our employees from engaging in discussions regarding the Union at any time on our plant premises.

WE WILL immediately rescind our progressive discharge system relating to employee tardiness which was promulgated because of our employee's activities on behalf of the Union.

JOHN CUNEO, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

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**This Is An Official Notice And Must Not Be Defaced By Anyone**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Marietta Tower - Suite 2400, 101 Marietta Street, NW Atlanta, GA., 30303, Telephone 404-242-2886.

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## APPENDIX C

The provisions of the National Labor Relations Act, as amended, involved in these cases are as follows:

Sec. 2 When used in this Act —

* * * * *

(11) the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

Sec. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

Sec. 8(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall

preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

## APPENDIX D

[38] JUDGE YOUNGBLOOD: He doesn't work there, he may not be, he's not an employee.

MR. OSBORNE: He's an employee of another employer at the time that the alleged interference was made.

JUDGE YOUNGBLOOD: Well, I'll overrule your objection. Go ahead.

MR. INGHAM: Recognizing earlier in the hearing, you try to get a lay of the land. Are we going to have objections from both of these gentlemen?

JUDGE YOUNGBLOOD: Yes, they can both raise objections.

BY MR. INGHAM:

Q. Now, Mr. Hall, directing your attention to the period of time in which you were the foreman on the second shift; did you have authority to hire and fire employees? A. Jerry Spurgeon did most of the hiring and firing.

Q. Was he on the second shift? A. He was on the first.

Q. Did you have authority, when you were on the second shift, to hire employees into the second shift? A. I don't think I ever hired anybody, I don't guess I had the authority if I wanted to.

Q. You guess you did? A. Then.

* * * * * * * *

[281] Q. And, if indeed, you did see something that was wrong, you would tell the employee to do it this way rather than that way; is that right? A. I'd help him to do it right, yeah.

Q. Did you have two employees on the first shift named Bullock and Worley? A. Worley?

Q. And, Bullock? A. Yes, sir.

Q. Do you remember them talking to you about a wage increase? A. Yes.

Q. They came to you and said they wanted a wage increase; didn't they not? A. No, they came to me and said they was — if they didn't get a raise, they was quitting.

Q. But, they were asking you for a wage increase, correct? A. No, they asked Charlie for a raise.

* * * * * * *

[288] Q. Did you — when he left, did you ever refer to yourself as foreman or supervisor, in that period from the end of May until the strike in September? A. When he left, I just did the best —

Q. Did you ever refer to yourself as foreman or supervisor? A. What do you mean?

Q. Did you ever call yourself by the title of foreman or supervisor during that period of time after Jerry Splurgeon left? A. No.

Q. You never did. And, if you had —

MR. LIDDLE: Objection. Speculative.

JUDGE YOUNGBLOOD: He said he hadn't.

MR. INGHAM: I understand, sir.

Q. Think hard on that one, Mr. Hall; you have — A. I've answered it.

Q. — never referred to yourself as a foreman or a supervisor?

MR. LIDDLE: Objection. Asked and answered.

BY MR. INGHAM:

Q. Let me show you what — would you mark this as Respondent's Exhibit Number One, please.

(Respondent's Exhibit No. 1 was marked for identification)

* * * * * * *

[292] Q. You don't recall? A. I don't recall nobody.

Q. Now, you got vacation, did you not? A. Yes, sir.

Q. And, hourly employees, other than you and Mr. Collins, do not get vacations; isn't that correct, paid vacations? A. Do what now?

Q. Hourly employees, other than you and Mr. Collins, do not get paid vacations; is that correct? A. In the shop, yes.

Q. All right. And, do you know whether the salaried employees, Mr. Izell, Mr. Cuneo, people up in the front end; do you know whether they get paid vacations? A. I believe they get two weeks.

Q. In your affidavit, Mr. Hall, you say that if an employee needed to leave work, he would tell you and then go; and that you would, after he had left, advised Charlie Izell that he had gone; is that correct? A. If Charlie's not there.

Q. I don't see anything about that. It says, if an employee needs to leave work he tells me. A. If Charlie is not there, he does.

* * * * * * *

[297] MR. OSBORNE: Your Honor, I don't believe that the record reflects it.

JUDGE YOUNGBLOOD: Yes, it's in the record.

Ask him the question again.

Did employees ever come to you and ask to go home?

THE WITNESS: They'd come tell me they was going home.

JUDGE YOUNGBLOOD: No, no. Did they ever come to you and ask you if they could go home?

THE WITNESS: Yes.

JUDGE YOUNGBLOOD: Now, that's the second time he's answered that question.

MR. OSBORNE: That's the first time I heard it, excuse me, Your Honor.

BY MR. INGHAM:

Q. Now, the tail end of that is, did you ever say to any employee, yes, you may go home, and then thereafter tell Charlie Izell? A. Yes.

Q. You have, okay.

In fact, Mr. Hall, didn't you pass judgment on whether or not the employee had a good —

MR. OSBORNE: Objection.

JUDGE YOUNGBLOOD: Go ahead. I'll overrule the objection

BY MR. INGHAM:

* * * * * * * *

[318] Q. You're not sure who it was? A. It was one or the other.

MR. INGHAM: No further questions, Your Honor.

JUDGE YOUNGBLOOD: Mr. Liddle, do you have anything further?

MR. LIDDLE: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. LIDDLE:

Q. Jerry, was there anybody there working at the shop any longer than you? A. No, sir.

Q. How many years did you say you were there? A. Around seven, I believe—six—seven.

Q. There was some testimony that an employee would come up to you and tell you that he would quit unless he got a raise. What did you do from that point? A. I'd tell Charlie. If I didn't want to go tell him, I just wouldn't tell him, I'd just ignore it.

Q. And, on the occasion when you told Charlie, what would you do then? A. I'd just tell him that he fixing to have some people working for him that was going to quit if they didn't get a raise, and they was good workers.

• • • • • • •

## APPENDIX E

STATE OF TENNESSEE

COUNTY OF HAMILTON

## AFFIDAVIT

Comes now Ronald G. Ingham, Attorney for Respondent John Cuneo, Inc., who after being duly sworn deposes and says:

(1)

I represented John Cuneo, Inc. in the National Labor Relations Board Case Nos. 10-CA-13130, 10-CA-13280, 10-CA-13357, and 10-CA-13417, which were tried before Administrative Law Judge James T. Youngblood in September and November, 1978.

(2)

During the course of the hearing, Respondent entered into evidence Respondent's Exhibit No. 11 reflecting replacement employees' dates of hire and striking employees' dates of reinstatement and/or other disposition. Additionally, Respondent entered Respondent's Exhibit No. 26 reflecting employees on the payroll for the week ending November 12, 1977, the week immediately preceding the date of the Union's unconditional offer to end the strike and return to work.

(3)

There was a contention made by the Counsel for the Charging Party and the Counsel for the General Counsel with regard to the supporting documents to both these exhibits. On either November 14, 15, or 16, 1978, during an approximately three

(3) hour midday break, Counsel for the General Counsel and Counsel for the Charging Party examined voluminous business records of Respondent, John Cuneo, Inc., under the direction of President B. R. Splawn. During this period of time Administrative Law Judge James T. Youngblood absented himself from the hearing room and obviously as a result of his comments appearing at JD 10, lines 8-18, was unaware of this investigation.

(4)

To the best recollection of the Affiant, no additional exhibits, copies of exhibits, or other questions regarding the propriety of any of Respondent's exhibits remained outstanding at the close of the hearing.

/s/ Ronald G. Ingham

Sworn to and subscribed before me this 9th day of May, 1980.

/s/ Dorothy C. Colby
Notary Public
My commission expires 9/21/83

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No. 82-455

# In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN CUNEO, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether, in circumstances where petitioner's refusal to recognize a union on the basis of authorization cards from a majority of the unit employees was itself an unfair labor practice because at the moment of the demand for recognition the petitioner began a series of serious and pervasive unfair labor practices that precluded the holding of a fair election, employees who struck in protest of the refusal to recognize the union are properly deemed to be unfair labor practice, rather than economic, strikers.

2. Whether substantial evidence supports the Board's finding that petitioner's unfair labor practices warranted the issuance of a bargaining order.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-30) is reported at 681 F.2d 11. The decision and order of the National Labor Relations Board (Pet. App. A-31 to A-76) are reported at 253 N.L.R.B. 1025.

### JURISDICTION

The judgment of the court of appeals was entered on June 18, 1982. The petition for a writ of certiorari was filed on September 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On September 15, 1977, 11 of petitioner's 14 fabrication shop employees signed cards authorizing Road Sprinkler Fitters Local Union No. 669, U.A. ("the Union") to be their collective bargaining representative (Pet. App. A-32, A-50). The next day two Union representatives informed petitioner's president, Bob Splawn, that a majority of the employees had authorized the Union to represent them and requested that petitioner recognize and bargain with the Union (Pet. App. A-32, A-51). Splawn refused, telling the Union to go to the National Labor Relations Board (Pet. App. A-32 to A-33, A-51).[1]

After Splawn refused the demand for recognition, he called employee Gerald Hall into his office and questioned him as to his knowledge of the organizational drive and his views regarding the union activity. Hall replied that he did not wish to discuss these matters (Pet. App. A-33, A-51). Later the same day, September 16, Hall was again summoned to Splawn's office in the presence of an attorney representing petitioner. Hall was again asked "what he knew about the Union." Hall again declined to respond. The attorney then asked Hall a series of questions designed to establish his possible status as a supervisor under the Act and asked Hall to sign a statement avowing that he was a supervisor. Hall refused and was told to consider the matter further over the ensuing weekend (Pet. App. A-33, A-51 to A-52).

Following the second meeting with Hall on September 16, Supervisor Ray Collins was called into Splawn's office, queried about his knowledge of who

[1] The Union filed an election petition on that same day (Pet. App. 51 n.7).

had signed authorization cards, and was instructed to discover the identity of the signers (Pet. App. A-33, A-52). After that meeting, Collins told employee Ted Hall that Splawn had ordered him to find out what he could about the Union, including the identities of employees who had signed authorization cards (Pet. App. A-33 & n.3).

On Tuesday, September 20, Gerald Hall was called into Splawn's office for a third meeting. Splawn again asked Hall to tell him about the union activity and to sign the statement saying he was a supervisor. Hall refused. Splawn then warned Hall that if he did not sign he would be terminated. Hall responded that he would just have to be fired, and he left the meeting. After being assured that Splawn did not really wish to fire him, Hall returned to Splawn's office. After some conversation concerning the benefits of unionization, Hall agreed to sign the statement. Subsequently, Hall signed an additional statement, which he had not read, avowing that he had encouraged other employees to sign authorization cards (Pet. App. A-33, A-52 to A-53).

Meanwhile, on September 20, the employees met and agreed that they would walk out on strike the following day if petitioner still refused to recognize and bargain with the Union (Pet. App. A-33, A-56). The next day, September 21, Union representatives visited President Splawn and repeated their demand for recognition and bargaining. Splawn refused recognition and referred the union representatives to his attorney. Shortly thereafter, eight of the ten-day shift employees walked out and began picketing petitioner (Pet. App. A-33 to A-34, A-56). Within an hour after the strike began, President Splawn came to the picket line, counted the striking employees, and announced that they would be permanently replaced

if they did not abandon the strike and return to their jobs within 15 minutes. The employees ignored Splawn's declaration and continued to picket (Pet. App. A-56). They were joined that evening by three of the night shift employees, as well as by Gerald Hall and Supervisor Ray Collins, who had quit their jobs (Pet. App. A-34, A-56).

On September 22, petitioner hired a Pinkerton guard who photographed the picket line (Pet. App. A-57). The following day, an attorney representing petitioner also photographed the pickets (Pet. App. A-34, A-57). Additionally, on October 14, petitioner's superintendent took photographs of employee Talkington while he was peacefully picketing a location where petitioner had an installation crew working (Pet. App. A-57).

The strike continued until November 14, when the Union's business manager forwarded to Splawn unconditional offers to end the strike and return to work from seven of the strikers. None of these seven employees was immediately offered reinstatement (Pet. App. A-34 to A-35, A-61).[2]

Prior to the onset of union activity, petitioner had established no fixed policy regarding employee tardiness and employees were not disciplined for being tardy. However, after strikers Bowes and Worley returned to their jobs in February 1978 (see note 2, *supra*), they were told by Foreman Ricky Kilgore that "if [they] were late three times, [they] would be

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[2] Thus, Christopher Bowes and David Worley were not reinstated until February 1, 1978; Donald Gregg was not reinstated until February 20, 1978; and Stan Ray not until June 23, 1978. As of the commencement of the hearing in this case, neither Melvin Talkington nor Jerry Brite had been offered reinstatement. Brite was offered reinstatement during the hearing (Pet. App. A-36 to A-37).

fired." Subsequently, after Bowes and Worley had been tardy on two occasions Kilgore said, "[T]hat's two times, you got one more try." The new rule was applied only to reinstated strikers; other employees who had neither struck nor supported the Union were not disciplined when tardy (C.A. App. 428, 459).[3] President Splawn also told Bowes and Worley that they were not to talk about the Union on the job (Pet. App. A-34, A-61 to A-62; C.A. App. 427-428, 458-459, 467-468).

2. The Board found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interrogating employee Gerald Hall three separate times (Pet. App. A-33, A-55); by creating the impression of surveillance of its employees' union activities through Supervisor Collins' conversation with Ted Hall (*ibid.*); by engaging in surveillance through its photographing of peaceful picketing (Pet. App. A-34, A-58); by promulgating a rule prohibiting employees from engaging in union discussion at any time on petitioner's premises (Pet. App. A-34, A-61 to A-62); and by threatening employee Gerald Hall with discharge if he failed to sign the statement saying that he was a supervisor (Pet. App. A-39). The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by instituting and enforcing a new progressive disciplinary system for tardiness to discourage membership in the Union, and by failing to reinstate the strikers as required by law (Pet. App. A-34 to A-35, A-62).

In view of petitioner's deliberate course of unlawful conduct designed to stifle further union activity and calculated to preclude holding of a fair repre-

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[3] "C.A. App." denotes the printed appendix filed in the court of appeals.

sentational election, which commenced on the date of the union's request for recognition, the Board determined that petitioner's refusal to recognize the Union on the date of its demand, September 16, violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and that a bargaining order was warranted. The Board further concluded that the ensuing strike was an unfair labor practice strike and that petitioner violated the Act by refusing to immediately reinstate the strikers upon their unconditional November 14 offer to return to work (Pet. App. A-35 to A-39, A-40 to A-41).

In issuing a bargaining order, the Board found that petitioner's unfair labor practices "were sufficiently serious and pervasive in character to preclude the holding of a fair election and to warrant the issuance of a bargaining order" under *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) (Pet. App. A-37). The Board noted that 7 of the 14 original unit employees had been subjected to discriminatory practices and, "[i]n view of the small size of the unit and the severity of the discriminatory practices, it is not unreasonable to infer that other employees were aware of [petitioner's] unlawful conduct against their coworkers" (Pet. App. A-38). The Board added that, "almost from the moment it learned of its employees' support for the Union, [petitioner] embarked on an unlawful course of conduct designed to stifle further union activity" (*ibid.*).

In determining that the recognitional strike was an unfair labor practice strike, the Board relied upon its decision in *Drug Package Co.*, 228 NLRB 108, 112 (1977), enf'd as modified, 570 F.2d 1340 (8th Cir. 1978), on remand, 241 N.L.R.B. 330 (1979).[4] In *Drug*

[4] An Administrative Law Judge had concluded (Pet. App. A-64 to A-66) that because the unit employees were aware

*Package Co.*, 228 N.L.R.B. at 112, the Board had explained that a recognitional strike is to be treated as an unfair labor practice strike when nonrecognition is unlawful because "the employer engaged in contemporaneous widespread illegal conduct designed to frustrate the statutory scheme [for determining representation through elections], and bargaining in particular." Here the Board concluded that the pervasive unfair labor practices committed by petitioner at the inception of the recognitional campaign met this test and accordingly rendered petitioner's withholding of recognition and refusal to bargain on September 16, 1977, unlawful under Section 8(a)(5). The Board thus concluded that "upon the [employees'] unconditional offer to return to work on November 14 [petitioner] had an obligation to reinstate the employees as unfair labor practice strikers" (Pet. App. A-39).

The Board's remedial order directed petitioner to cease and desist from its unlawful practices, to recog-

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of petitioner's pervasive violations of Section 8(a)(1) that occurred prior to the commencement of the strike on September 21 (see pages 3-5, *supra*), their strike was an unfair labor practice strike. The Board rejected this reasoning, although not the ultimate conclusion (Pet. App. A-35 to A-41). The Board set forth its view (*id.* at A-35) that "an unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather, there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices." The Board explained that the record in this case showed that the strike was commenced to secure recognition, rather than in response to petitioner's violations of Section 8(a)(1) (*id.* at A-35 to A-36). The Board accordingly concluded that "whether the strike was an unfair labor practice strike depends on whether it can be so classified under the Board's decision in [*Drug Package*]" (*id.* at A-36).

nize and bargain with the union retroactively from the date of the initial refusal to accord recognition, to offer immediate and full reinstatement to the strikers and to make them whole for any loss of earnings in the period during which reinstatement had been withheld, to abolish its rule precluding discussion about the union at the workplace, and to rescind its discriminatory disciplinary system (Pet. App. A-40 to A-44).

3. The court of appeals (Pet. App. A-1 to A-30) upheld the Board's decision and enforced its remedial order, concluding that the Board's factual findings were supported by substantial evidence (Pet. App. A-3 n.1), and that its legal conclusions were sound.

Initially (Pet. App. A-9 to A-16), the court of appeals upheld the Board's determinations respecting petitioner's unfair labor practices committed in violation of Sections 8(a)(1) and 8(a)(3) of the Act —the coercive interrogation of, and threat to discharge, Gerald Hall,[5] the coercive surveillance of employees' union activities that was unsupported by any legitimate purpose, the failure to reinstate strikers willing to return even when vacancies were available,[6]

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[5] The court upheld the Board's determination that Hall was not a supervisor (Pet. App. A-10 to A-11). Petitioner had not otherwise contested the Board's determination that this conduct was an unfair labor practice.

[6] The court of appeals agreed with the Board (and thus disagreed with the Administrative Law Judge) (see page 6 note 4, *supra*) that the strike was a recognitional strike, rather than one designed to redress the Section 8(a)(1) unfair labor practices committed by petitioner in response to the union's request for recognition (Pet. App. A-13). Because a strike for recognition is ordinarily (*i.e.*, absent circumstances that make nonrecognition itself an unfair labor practice) an economic strike, rather than an unfair labor practice strike, the court of appeals assumed for the purposes

the institution of a "no-union-talk" rule, and the adoption and discriminatory application of a disciplinary system for the purpose of discouraging union membership. As to each violation, the court of appeals determined that the Board's finding was supported by substantial evidence and its legal conclusions consistent with settled precedent (Pet. App. A-9).[7]

Turning to the Board's remedial order and the reasoning underlying it, the court of appeals agreed first with the Board that the conditions for issuance of a bargaining order outlined by this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), were

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of discussion of the reinstatement issue that the strikers were economic strikers. The court recognized that, unlike unfair labor practice strikers, who are entitled to immediate reinstatement upon making an unconditional offer to return to work even if that requires displacement of "permanent" replacements, economic strikers are entitled to reinstatement only when an opening not filled by a permanent replacement exists. Compare *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938), with *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 380-381 (1975). Because the evidence supported the Board's conclusion that petitioner had not rehired all of the strikers even when vacancies were available, the court of appeals concluded that even regarding them as economic strikers petitioner's failure to reinstate the returning employees was an unfair labor practice (Pet. App. A-13 to A-15 & n.10). As discussed below (pages 11-14), the court of appeals treated separately the question whether the employees were in fact unfair labor practice strikers in this case. Because it concluded that they were, it ultimately ordered payment of backpay for the entire period following their offers to return to work.

[7] The court of appeals also upheld (Pet. App. A-9 n.6) the Board's dismissal (*id.* at A-58 to A-61, A-62 to A-63) of the portions of the complaint alleging that the discharge of one employee and interrogation of another were unlawful. No issue concerning those aspects of the case is presented here.

satisfied here (Pet. App. A-17 to A-22). Thus the court upheld the Board's conclusion that the authorization cards signed by employees in this case were reliable indicators of majority support for the union, finding no evidentiary support for petitioner's contention that the cards had been procured in an improper or unreliable manner (*id.* at A-17 to A-19). The court also agreed with the Board that the unfair labor practices committed by petitioner were sufficiently serious to undermine the union's majority and thus to undercut the reliability of the normal electoral process for determining representation. The court of appeals noted (Pet. App. A-20):

> [c]ourt and board cases often have viewed unfair labor practices similar to the ones in this case—interrogation, threatened discharge, surveillance, discriminatory application of work rules—as conduct which supports the issuance of a bargaining order. * * * In addition, the Company's delayed reinstatement of the striking employees was a particularly serious unfair labor practice.

The court also concluded that the Board had not abused its remedial discretion, resting upon application of its expertise, by determining, as *Gissel* requires, that the petitioner's unfair labor practices were so serious and pervasive that the possibility of arranging an election that would accurately reflect the desires of the employees was slight and that the union's majority status was therefore best to be determined by reference to the authorization cards (*id.* at A-20 to A-22).

Next, the court of appeals sustained the retroactivity feature of the Board's bargaining order (Pet. App. A-22 to A-23). The court upheld the Board's

conclusion that, because petitioner had simultaneously engaged in a course of illegal conduct that undercut the normal electoral process for determining a union's majority status, petitioner's withholding of recognition was, from the inception, itself an unfair labor practice violative of Section 8(a)(5) of the Act. The court thus approved the Board's rule, announced in *Trading Port Inc.*, 219 N.L.R.B. 298 (1975), of making bargaining orders retroactive so as to remove any incentive for employers to engage in unfair labor practices in order to postpone an election and thereby retain for an extra time the ability to make unilateral decisions affecting employees.[8]

Finally, the court of appeals upheld the Board's *Drug Package* rule and its application to this case (Pet. App. A-24 to A-30), agreeing that in the circumstances presented, the strikers were properly treated as unfair labor practice strikers, entitled to immediate reinstatement once they had offered to

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[8] In *Trading Port, Inc., supra*, the Board had held that *Gissel* bargaining orders would be retroactive to the later of the date on which the union achieved majority status and the date on which the employer commenced its unfair labor practices. The court below approved that policy "where, as here, the union had majority support within the bargaining unit, the employer refused to bargain with the union, and the employer engaged in serious and pervasive unfair labor practices sufficient to justify a bargaining order under *Gissel*" (Pet. App. A-23). Because the Union had requested recognition prior to the commencement of petitioner's unfair labor practices the court did not decide whether a retroactive order would have been appropriate in the absence of a request for recognition, or whether a bargaining order may be made retroactive to a date prior to a demand for recognition where the union achieves a majority and the employer commences unfair labor practices prior to a demand for recognition (Pet. App. A-23 to A-24 n.18).

return to work. The court explained (Pet. App. A-25 to A-26):

> In one sense, the treatment of striking employees as unfair labor practice strikers under the circumstances of *Drug Package* and of this case follows by simple logic from the imposition of a retroactive bargaining order. Concomitant with the imposition of the retroactive bargaining order is a conclusion that the employer's refusal to recognize and bargain with the majority union was a violation of section 8(a)(5). * * * Since the employer committed an unfair labor practice in its refusal to recognize the union, and since the employees then struck for recognition, the employees' "absence from the workplace [was] prompted by employer conduct that [was] found to constitute an unfair labor practice." * * * Hence, the employees were unfair labor practice strikers.

The court added that "[t]he *Drug Package* doctrine is also warranted by well-recognized policies of the Act" (Pet. App. A-26). The court noted that an employer is not required to recognize a union which presents authorization cards from a majority of the unit employees, but may insist on a Board-conducted representation election, and that a union is then free to strike for recognition in the hope that this tactic "will shorten the route to recognition and bargaining" (Pet. App. A-27). The court explained, however (*ibid.*):

> If the employer exceeds its legal rights and embarks on an unlawful campaign to undermine the union's support, it may injure the employees' protected interests in at least two distinct ways. First, the employer's unfair labor practices may prevent the employees from freely expressing

their union preferences in a Board conducted election.

Injury of this first kind, the court of appeals noted, may be redressed in appropriate circumstances by issuance of a *Gissel* bargaining order. The court explained, however, that unlawful employer conduct may cause a second type of injury to employees that is not redressed by a *Gissel* bargaining order (Pet. App. A-28; footnote omitted):

> Second, the employer's illegal conduct may cause excessive economic harm to employees who have participated in a lawful strike for recognition. As noted above, when a union demands recognition, the employer has two lawful options. The employer may recognize and bargain with the union, in which case no strike for recognition will follow. Alternatively, the employer may refuse to recognize the union and await the outcome of a Board election. If the employer does not impede the electoral process, the recognitional strike should last no longer than the date of the election. If, however, the employer rejects these lawful alternatives and undermines or prevents an election, the strike likely will be prolonged as a consequence of activity that is clearly forbidden by the Act. In other words, the employees' continued strike, and continued loss of earnings, would result directly from their employer's illegal conduct.[9]

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[9] The court cautioned that it expressed no view as to the applicability of *Drug Package* to cases in which a recognitional strike antedates the employer's refusal to bargain, or in which the employer's unfair labor practices begin after the employees have offered to return to work (Pet. App. A-29 n.22)—circumstances not present here. The court declared (*ibid.*): "We assume that the Board will apply *Drug Package* in different cases judiciously, keeping in mind that its orders may not be punitive."

Finally, the court rejected petitioner's contention that the Board's policy was punitive rather than remedial (Pet. App. A-29 to A-30). Since an employer's unfair labor practices may extend a strike beyond the time when it would have ended pursuant to the operation of the Board's election processes, the employees would not be made whole absent a reinstatement order, the court explained. "Similarly, the Board may properly conclude that the employer has forfeited its right to hire permanent replacements for its striking employees when their absence from work stems from the employer's unlawful impairment of the electoral process" (*id.* at 29). The court of appeals thus concluded that "[t]he *Drug Package* doctrine * * * lies within the broad remedial discretion that Congress gave to the Board," as recognized by this Court (*id.* at 29-30).

## ARGUMENT

As the court of appeals explained in its careful and well-reasoned opinion, upon which we rely, the Board's *Drug Package* rule, and its application in this case are consistent with the decisions of this Court and the provisions and policies of the Act. The decision of the court of appeals, moreover, does not conflict with any decision of any court of appeals.[10] Indeed, petitioner

[10] In *Drug Package Inc.* v. *NLRB*, 570 F.2d 1340 (8th Cir. 1978), itself, the court rejected the Board's finding of a Section 8(a)(5) refusal to bargain violation because it had not been litigated in the proceeding before the Board (*id.* at 1345-1346). The court similarly refused to make retroactive the *Gissel* bargaining order, which it upheld in other respects, reasoning that application of the Board's *Trading Port* retroactivity policy would be unfair because "[b]oth the hearing and crucial actions by the parties occurred prior to the Board's decision in *Trading Port*" (*id.* at 1346). Because it had rejected the Board's refusal to bargain finding, the court

does not suggest otherwise. Further review is accordingly unwarranted. In any event, as we explain below, petitioner's submission is based upon a mischaracterization of the decisions of the court of appeals and of the Board, confuses the various issues decided by the court, and is otherwise without merit.[11]

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also rejected the Board's finding that the strike was an unfair labor practice strike (*id.* at 1347-1348), noting that "[t]he finding of an 8(a)(5) violation is a crucial step in the Board's reasoning." The court remanded the case to the Board to determine whether the strikers nevertheless should be entitled to reinstatement in order to make the bargaining order meaningful (*id.* at 1348-1349). Accepting the remand as the law of the case, the Board held that, in the particular circumstances, reinstatement of the strikers was necessary to give meaning to the bargaining order. 241 N.L.R.B. 330, 331-332 (1979).

As the court of appeals below noted (Pet. App. A-25 n.19), the unfairness perceived by the Eighth Circuit in *Drug Package* does not exist here; that court has, subsequent to *Drug Package*, upheld the imposition of a retroactive bargaining order in *Alumbaugh Coal Co.* v. *NLRB*, 635 F.2d 1380, 1386 (8th Cir. 1980). Of course, petitioner's violation of Section 8(a)(5) here was fully litigated and properly determined; so nothing in the Eighth Circuit's *Drug Package* decision calls in question the decision of the court of appeals in this case.

[11] We note as well that the primary arguments advanced in this Court by petitioner (see Pet. 7-9) were not advanced before the Board; neither did petitioner challenge the Board's *Trading Port* and *Drug Package* doctrines generally. Judicial review of petitioner's contentions accordingly is barred by Section 10(e) of the Act, 29 U.S.C. 160(e). See *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21. In contrast with *Woelke & Romero*, moreover, petitioner did file a motion for reconsideration before the Board here, but its argument on that occasion assumed the validity of the *Drug Package* rule and contended only that the facts of this case did not show pervasive and wide-ranging unfair labor practices sufficient to trigger application of the

1. Petitioner does not directly question the Board's *Drug Package* doctrine or the related *Trading Port* rule. Rather, petitioner contends (Pet. 7) that, by issuing a retroactive bargaining order and deeming the strikers to be unfair labor practice strikers, the Board has "ma[d]e[] a shambles of the doctrine of striker reinstatement rights as enunciated by this Court," improperly depriving it of its right to hire permanent replacements for economic strikers (see pages 8-9 note 6, *supra*) because "[w]hen the strike began on September 21, it began as an economic strike" and "[n]othing occurred during the strike to change it from an economic strike to an unfair labor practice strike" (Pet. 7).[12] There is no merit to these contentions.

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rule. We note that petitioner did not even raise the arguments now advanced in the court of appeals; rather that court addressed them sua sponte. For these reasons the questions now presented are not properly before the Court.

[12] An economic strike is one called to exact economic concessions. See, *e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967). An unfair labor practice strike is one called in response to an employer's violation of the NLRA. If, during an economic strike, an employer commits what the Board later determines to be an unfair labor practice and the union continues the strike beyond its natural duration to protest that practice, the strike is converted into an unfair labor practice strike. In such circumstances, the strikers become unfair labor practice strikers on the date of the conversion. If they subsequently make an unconditional offer to return to work, they are entitled to immediate reinstatement if they had not been permanently replaced before the strike's conversion. *Philip Carey Mfg. Co., Miami Cabinet Div.* v. *NLRB*, 331 F.2d 720, 729 (6th Cir.), cert. denied, 379 U.S. 888 (1964); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1061 (10th Cir. 1971). See Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 Va. L. Rev. 1322 (1959); 49 Va. L. Rev. 1297 (1963).

a. Petitioner errs in stating (Pet. 7) that when the strike began on September 21, it was an economic strike and misrepresents the determination of the Board and court of appeals by implying (*ibid.*) that they endorsed that characterization. Rather, as is explained above (pages 6-7, 8 note 6, 11-12), the ultimate conclusion of both Board and court was that the strike was *from its inception* an unfair labor practice strike. Although the Board and court of appeals rejected the ALJ's finding that the strike was a response to petitioner's unfair labor practices in violation of Section 8(a)(1) (see pages 6-7 note 4, *supra*), concluding that the strike was recognitional in nature, both also concluded that because petitioner's nonrecognition of the union was, in the circumstances of this case, a violation of Section 8(a)(5), the recognitional strike was an unfair labor practice strike. And the Board and court of appeals agreed that the strike must be so characterized from its very inception because from the moment union activity began, it was met with a course of serious and pervasive unfair labor practices that had the purpose and effect of undermining the union majority and the representation election process itself. Petitioner's assertion (Pet. 7) that nothing happened during the strike to convert it from an economic strike to an unfair labor practice strike simply ignores the actual reasoning and decision of the court of appeals and the Board.

Given the actual reasoning adopted by the Board and court of appeals there is no substance whatever to petitioner's claim that the settled rules governing reinstatement rights have been disturbed. Rather, the *Drug Package* rule applied here entails no more than the insight that refusal to recognize a union based upon authorization cards under circumstances where the alternative means of fairly ascertaining majority

status—an election—is willfully obstructed, is an unfair labor practice. The reinstatement rights of strikers for recognition are accordingly the rights of unfair labor practice strikers in these circumstances.

b. Petitioner errs as well in asserting (Pet. 7, 8) that the single unfair labor practice that warranted imposition of the bargaining order was the one that occurred *after* the strike was over—failure promptly to reinstate the strikers. Rather, as indicated above (pages 6 & 10), both the Board and the court relied upon petitioner's entire course of conduct in determining that a bargaining order was warranted. Contrary to petitioner's suggestion (Pet. 8) that its reinstatement violations "undoubtedly tipped the scales for the *Gissel* order," the court of appeals' opinion makes clear (Pet. App. A-20; see page 10, *supra*) that petitioner's unfair labor practices—coercive interrogation, threatened discharge, coercive surveillance and discriminatory application of work rules—each were of a kind that would support issuance of a bargaining order. Of course petitioner's coercive interrogation and its threat to discharge Gerald Hall, and one of its acts of surveillance occurred before the strike began, and the remaining acts of unlawful surveillance occurred before the strike ended.

c. Contrary to petitioner's assertion (Pet. 9), the *Drug Package* rule was not prompted by considerations of "administrative convenience," but by the need to devise an effective remedy for the employer's frustration of the election process.[13] The rule is a reason-

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[13] Because, as we explain above (page 17), neither the Board's decision nor the court of appeals' decision rests upon any notion that an economic strike was somehow converted into an unfair labor practice strike at some point after its inception, petitioner's argument is unresponsive to the actual holding of this case.

able means of making employees whole for prolongation of the strike caused by the employer's frustration of the election process and serves the "goal [of] * * * deterring employer misbehavior" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 614) by precluding hiring of permanent replacements for strikers by an employer that commits serious and pervasive unfair labor practices that undermine the representation election process and thereby render unlawful the employer's refusal to recognize a union which obtained valid authorization cards from a majority of its employees, which refusal has, in turn, prompted a recognitional strike.

2. Petitioner suggests, finally, that this Court "should also consider whether the record as a whole contains substantial evidence to support the Board's bargaining order" (Pet. 10). Remarkably, petitioner does not even argue the negative of this proposition. And the court of appeals' opinion carefully and correctly applies this Court's decision in *Gissel* to the facts of the instant case.

Petitioner's only specific contention respecting the adequacy of the record is that its Exhibit 11 (C.A. App. 132), on which the Board based its finding (Pet. App. A-36 to A-37) that petitioner had not offered vacancies to strikers who offered to return to work even when vacancies arose, was cast in an unfair light by the Board. Of course, as is noted above (page 18), there is no reason to believe that the Board's or court of appeals' decisions respecting the bargaining order depends upon this particular unfair labor practice finding. In any event, contrary to petitioner's suggestion, the Board's finding in this respect does not depend upon the Board's comment (*ibid.*)—which petitioner seems to endorse—that its exhibit was incomplete. Rather, the Board's finding rests upon the fact

that petitioner's exhibit affirmatively demonstrates that there were vacant positions available after the time that the strikers offered to return to work that were not offered to the strikers (see Pet. App. A-37). We note, moreover, that even now petitioner does not claim that the Board's finding or its own Exhibit was inaccurate in this respect. Petitioner merely seeks a remand to allow submission of unspecified evidence bearing upon Exhibit 11. Plainly this matter does not warrant this Court's review.[14]

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[14] There is no merit to petitioner's suggestion (Pet. 10) that, because of the Board's rejection of the ALJ's *reasons* for concluding that the strike was, from its inception, an unfair labor practice strike (see page 6 note 4, *supra*), it was somehow unfairly taken by surprise by the Board's reliance upon Exhibit 11. The Board's ultimate conclusion remained the same as the ALJ's and thus in the final analysis nothing turned upon the Board's, or the court of appeals' (see page 8 note 6, *supra*), intermediate conclusion that petitioner had unlawfully delayed reinstatement, even if the strike were deemed purely economic. In any event, petitioner had every incentive throughout all phases of the Board proceedings to perfect the record respecting reinstatement and vacancies, for petitioner argued throughout that the strike was economic and that it had not committed any unfair labor practice respecting reinstatement (see Pet. App. A-64). As the court of appeals noted (Pet. App. A-14), the employer bears the burden of showing that economic strikers were permanently replaced and that no vacancies were available. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369 (1968), enf'd, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). Thus, petitioner can only blame itself if it presented incomplete or misleading evidence in the Board's proceedings. We note that while petitioner quarreled with the Board's discussion of Exhibit 11 in its motion to reconsider (see page 15 note 20, *supra*)—suggesting that the Board's observation that the Exhibit was incomplete was somehow

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1982

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unfair, as we have explained above (page 20) that observation was not the basis of the Board's decision. Petitioner's motion for reconsideration—like its petition in this Court—did not assert that the Board's factual determination was erroneous.

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NO. 82-455

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN CUNEO, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

# BRIEF FOR ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., IN OPPOSITION

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## QUESTIONS PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board exceeded its discretionary authority by issuing a retroactive bargaining order to remedy the Company's serious and pervasive unfair labor practices.

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## OPINIONS BELOW

The opinion of the court of appeals (A1-30) is reported at 681 F.2d 1. The decision and order of the National

Labor Relations Board (A31-76) is reported at 253 NLRB 1025.

## JURISDICTION

The judgment of the court of appeals issued on June 18, 1982. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act of 1935, as amended (49 Stat. 449, 29 U.S.C. §160(c)), provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . .

## STATEMENT OF THE CASE

### A. Facts

Road Sprinkler Fitters Local Union No. 669, U.A. ("the Union") began organizing the employees of John Cuneo, Inc. ("the Company") on September 15, 1977. Eleven of the Company's 14 employees signed a Union authorization card that day. (A. 50, 32, 3). On September 16, Union officials informed the Company that they represented a majority of the Company's employees and requested

recognition and bargaining. The Company refused and suggested that the Union seek an election through the National Labor Relations Board ("the Board"). (A. 51, 32-33, 3).

Immediately after rejecting the Union's demand for recognition, the Company began its campaign of unfair labor practices. Company President Robert Splawn twice unlawfully interrogated employee Gerald Hall on September 16 and directed supervisor Ray Collins to discover who had signed the authorization cards. Collins thereupon unlawfully interrogated employee Ted Hall and told him he had been instructed to discover the identity of the Union's supporters. (A. 51-52, 55, 33, 3-4). On September 18, Splawn threatened Gerald Hall with discharge if he refused to sign an

affidavit which falsely asserted that he was a supervisor. (A. 52, 33, 4).

On September 20, the employees agreed to strike unless the Company recognized the Union the next day. When Splawn refused, eight of the ten employees on duty struck and began picketing on September 21. Splawn immediately threatened to replace them permanently if the strike did not end in fifteen minutes. (A. 56, 33-34, 5). On September 23 and October 14, Company agents photographed the peaceful pickets. (A. 57, 34, 5).

The strike ended on November 14 when the Union unconditionally requested the reinstatement of seven strikers. None of the seven was immediately offered reinstatement. Despite hiring new employees on November 25 and 30, 1977 and January

17, 1978, the Company did not recall any strikers until February 1, 1978. (A. 61-62, 34-35, 15, 6).

After recalling the first two strikers, Splawn told them that they should not talk about the Union on the job. They were also warned not to be late again and were threatened with discharge if they were late in the future. Prior to the advent of the Union campaign, the Company had no such policies. (A. 61-62, 34, 6-7).

B. The Board's Decision and Order

The Board concluded that the Company violated Section 8(a)(1) of the Act by interrogating and threatening Gerald Hall, by creating the impression of surveillance, by engaging in surveillance and by promulgating a rule

prohibiting employees from discussing the Union in the plant; and violated Section 8(a)(3) by promulgating stricter disciplinary rules, by threatening employees with discipline if they violated those rules and by refusing to reinstate the unfair labor practice strikers immediately upon their unconditional request for reinstatement. The Board further concluded that the Company violated Section 8(a)(5) by refusing to bargain with the Union on September 16, when it represented a majority of the employees in an appropriate unit. (A. 40).

In reaching these conclusions, the Board rejected the Administrative Law Judge's finding that the employees engaged in an unfair labor practice strike from the inception. Rather, the Board held that the employees commenced

an economic strike nature of which was thereafter converted by the Company's unfair labor practices. (A. 32, 35-37).

C. The Decision of the Court of Appeals

The court of appeals enforced the Board's Order in full. It concluded that the Board's factual findings were "supported by substantial evidence." (A. 3, 9). The court also concluded that the Board had properly directed the reinstatement with back pay of the strikers (A. 24-30) and had properly directed the Company to bargain with the Union. (A. 17-23).

## REASONS FOR DENYING THE WRIT

1. Although portions of the Board's Decision and Order were expressly predicated upon Drug Package Co., Inc., 228 NLRB 108 (1977), enf'd as modified, 570 F.2d 1340 (8th Cir. 1978) (A. 36-39), the Company did not contest either the validity or the applicability of Drug Package to the facts of this case in its briefs to the Board or to the court of appeals.[1/] Certiorari is inappropriate where the issue presented to this Court was not urged and briefed to the court of appeals. Neely v. Eby Construction Co., 386 U.S. 317, 330 (1967); Lawn v. United States, 355 U.S. 339, 362, n. 16

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1/ If this Court deems it appropriate, the Company's briefs can be submitted to the Court to establish this point.

(1958); California v. Taylor, 353 U.S. 553, 557, n. 2 (1957). It is not enough that the opinion below may have mentioned and discussed a matter not properly raised by the Petitioner. Tyrell v. District of Columbia, 243 U.S. 1, 5-6 (1916). The Company is, therefore, foreclosed from raising the issue upon which its petition for a writ of certiorari is primarily based.

2. Certiorari is not necessary where, as here, the decision below is consistent with opinions of this Court and where, as here, there is no division among the courts of appeals on the issue. The Drug Package doctrine logically builds upon several uncontested and well established principles of labor law. An employer may, regardless of motive, refuse a union's demand for recognition based

upon a card majority and may compel a union to demonstrate its majority support in a Board-conducted election. Nevertheless, an employer who rejects a demand for recognition may not use the interval before the election to commit unfair labor practices in an attempt to destroy the union's support. Linden Lumber Division v. NLRB, 419 U.S. 301, 310 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 600 (1969). If the employer's unfair labor practices preclude the holding of a free and fair election, the employer's refusal of recognition becomes unlawful and the employer will be ordered to bargain with the union. Id. at 614-615. The bargaining order will be retroactive to the date the union demonstrated majority support and demanded recognition or to the date of the first

unfair labor practice, whichever is later. Trading Port, Inc., 219 NLRB 298 (1975). Petitioner did not contest the application of Trading Port before the court of appeals and may not do so now. However, the Trading Port doctrine has been generally accepted by the courts of appeals. See, e.g., Ann Lee Sportswear, Inc. v. NLRB, 543 F.2d 739, 744 (10th Cir. 1976); NLRB v. Solboro Knitting Mills, Inc., 572 F.2d 936 (2d Cir. 1978), cert. denied, 439 U.S. 864.

In Drug Package, the Board held that an economic strike for recognition is converted into an unfair labor practice strike where the employer's independent unfair labor practices combine to convert the initially lawful refusal of recognition into a separate unfair labor practice. Supra, 228 NLRB

at 112. The Board does not reach the Drug Package issue until it has determined that the refusal to bargain was unlawful and that a retroactive bargaining order is necessary. Drug Package is one result of the bargaining order, not the rationale for the bargaining order. Each court of appeals which has considered Drug Package has accepted this proposition. Drug Package, Inc. v. NLRB, 570 F.2d 1340, 1348 (8th Cir. 1978); NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 754 (7th Cir. 1981), cert. denied, 454 U.S. 894. Even prior to Drug Package, the Board and courts agreed that where an unlawful refusal to bargain caused or contributed to a strike, the strike was an unfair labor practice strike. See, e.g., Ploof Transfer Co., 201 NLRB 828 (1973), enf'd, 485 F.2d 686 (5th Cir. 1973).

3. The Company's alternative basis for seeking a writ is without merit. Whether the Board properly concluded that the Company's unfair labor practices so polluted the atmosphere that a free and fair election could not be held is a factual and evidenciary question, as the Company has itself conceded. Petition, p. 10. This Court does "not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Both the Board (A. 36-37) and the court (A. 13-15) agreed that the Company violated Sections 8(a)(3) and (1) by, inter alia, failing to accord the economic strikers their potential recall rights. They further agreed that the Company's accumulated unfair labor practices constituted a violation

of Section 8(a)(5) and necessitated a remedial bargaining order. There is no reason for this Court to review these factual determinations which the court below found to be supported by substantial evidence. (A. 3, n. 1).

## CONCLUSION

For the reasons stated herein, the Petition should be denied.

Respectfully submitted,

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